THE LAW OF LANDLORD AND TENANT,

AS ADMINISTERED IN THE

COURTS OF THE BENGAL PRESIDENCY.

BY

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CALCUTTA:

WYMAN & CO., PUBLISHERS, HARE STREET.

1869.

333.5
W572

CALCUTTA CENTRAL PRESS COMPANY, LIMITED,
5, COUNCIL HOUSE STREET.

3225

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PREFACE.

THE following work is an attempt at a digest of the authorities which constitute the Law of Landlord and Tenant now in force in the Lower Provinces. It includes all the enactments from 1793 down to the present time, and, it is hoped, all the cases of any importance on the subject to be found in the published reports of the Privy Council, the Sudder Dewanny Adawlut, and the High Court, as well as some of the cases decided by the Agra Court. It also contains a good deal of matter taken from other authorities on the subject, such as the Minutes of the Judges on Act X, the Orders of the Boards of Revenue, Harington's "Analysis of the Regulations," the "Fifth Report from the Select Committee on the affairs of the East India Company," Brigg's "Land-tax of India," Wilson's "Glossary of Revenue Terms," Smyth's "Zemindary Accounts," &c., and free use has been made of the editions of Act X published under the auspices of the Boards of Revenue at Calcutta and Agra, of Mr. Field's "Rent Law Procedure," and of the works of Smith, Addison, Broom, and others on English Law.

The arrangement is in the main the same as that adopted in Smith's "Law of Landlord and Tenant,"—the various questions that arise between landlord and tenant being treated of, as far as possible, in the chronological order in which they present themselves, from the time of the commencement

of the relation of landlord and tenant to the time of its close. This method appears preferable to the ordinary one of arranging the subject in the order of the Sections of Act X, because Act X is not a complete Code of the substantive law, and its Sections therefore do not afford a sufficient number of heads to range the various cases under. It is quite silent, for instance, on such important matters as the powers of various landlords to grant leases, the rules as to cesses and rent in kind, the rules as to payment of rent and appropriation of payments, the rules as to enhancement of talukdars' rents, the landlord's obligation to maintain the tenant in quiet possession, the tenant's right to alluvial increments, the landlord's obligation to give notice to his tenants on transferring his estate, the rules as to cancelment of leases by sale of the landlord's estate for arrears, &c., and, besides these omissions, portions of the substantive law, intimately connected with one another, appear in the Act at widely distant intervals. The rule as to registering transfers of taluks, for instance, is given in Section 27, while the consequence of omitting to register is not to be found before Section 106, and even then only partially stated, and merely by way of proviso to a rule of procedure.

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LIST OF ABBREVIATIONS.

P. C —Privy Council.
H. C.—High Court.
S. R.—Select Reports.
S. D.—Sudder Dewanny.
R. B.—Board of Revenue.
R. S. C.—Reports of Summary Cases.
N. W. P.—Reports of Agra, Sudder, and High, Courts.
F. B.—Full Bench.
Smith.—Smith's Law of Landlord and Tenant (5th edition.)
Peters.—Peters' orders of the Board of Revenue.
W. R.—Weekly Reporter.
G. O.—Government Order.
C. O.—Circular Order.
E. C.—On the contrary.
L. C.—Leading Cases.
S. C.—Same Case.

THE

LAW OF LANDLORD AND TENANT.

CHAPTER I.

VARIOUS KINDS OF TENANCY

Origin of the Law.—The law of Landlord and Tenant, now in force in the Lower Provinces of the Bengal Presidency, originated with the Permanent Settlement of 1793. During the rule of the Native Governments, as well Muhammadan as Hindu, the actual cultivators were usually considered to be the proprietors of the soil. The payments made by them to the State were not considered to be "*rent*," that is, a return for the use of land belonging to another, but corresponded rather to the English land-tax; being described by *Manu* as a tax paid to the King as "the price of protection," and by Muhammadan lawyers as "*khiraj*," or the tribute levied on infidels after conquest (*a*). The persons to

(*a*) See Briggs' Land-tax, 90; Baillie's Land-tax, Ch. 6; Memoir on the Taxation of India, pp. 34-50; Grant's Analysis, Fifth Report, I, 548. It was a common saying that, "the tax belongs to the King, but the land belongs to the *ryots*."—Tod's Rajasthan, I, 495. Sir J. Shore, however, quotes this as the land belongs to the *Zamindars* (?) III, Harington, 228, 348. The fact is that property in the English sense of the term, that is, the exclusive use and absolute disposal of the powers of the soil in perpetuity, was in no one person, the King and the *ryot* were equally entitled by right to a share of the produce.—Elphinstone's History of India, Book II, Chapter II. "The *Zamindars* were, under the *Muhammadan* practice, landholders of a peculiar description, not

whom this tax was immediately paid were not landlords, but merely hereditary collectors of revenue, and the preamble to Regulation II, 1793, expressly states that the property in the soil was never declared to be vested in these *Zamindars* before the Permanent Settlement. Therefore, it is only by the legislation of 1793 that the *Zamindars* have become genuine landlords, and the *ryots* genuine tenants, and the entire law of landlord and tenant is to be found in the laws enacted since that date, and in the judicial expositions of those laws by the Sudder and High Courts (*a*). For the purposes of this treatise, it is unnecessary to enquire into the Hindu and Muhammadan law, inasmuch as, whatever rights certain classes of tenants might have possessed antecedently to the Permanent Settlement in 1793, they can now claim no other rights than such as are expressly recognised as belonging to them in the Regulations and Acts enacted since that date (*b*).

Relation of Government to Zamindars.—In the following pages the relation between Government and the *Zamindars* is not regarded as coming within the scope of the law of Landlord and Tenant, for though, on the one hand, the Regulations contain expressions which seem to imply that the *Zamindars* are tenants

definable by any term in our language;—receivers of the territorial revenue of the State from the *ryots*;—allowed to succeed to their *Zamindaris* by inheritance, yet generally required to take out a renewal of their titles from the Sovereign on the payment of a fine to the Emperor and a present to the *Nazim*;—permitted to transfer their *Zamindaris*, yet commonly expected to obtain previous special permission;—privileged to be generally the annual contractors for the public revenue received from their *Zamindaris*, yet set aside with a limited provision in land or money when it was the pleasure of Government to collect the rents by separate agency, or to assign them temporarily or permanently by the grant of a *jaghir* or *altamgha*;—authorised to apportion to the different villages the cesses imposed by the *Sukbahdar*, yet subject to the discretionary interference of public authority to equalise the assessment;—and liable to render accounts."—Harington, II, 400.

(*a*) See a judgment of Sir L. Peel quoted by Mr. Norman.—H. C., 23, January 1865.

(*b*) *Ishuar Ghose*.—H. C., 17th March, 1864

of the State,—as, for instance, when they speak of farmers and ryots as "under-farmers" and "under-tenants,"—yet the terms "landlord" and "tenant" are not commonly used to express the species of relation which subsists between the State and proprietors of land, and it has been ruled by the Privy Council that there is no relation of landlord and tenant in these cases (*a*)

Classification of Tenancies.—The English classification of tenancies into those for life, for a term of years, at will, and on sufferance, a classification based solely on the different duration of the tenants' interests, does not serve as an accurate division of Indian tenancies In India the most marked distinctions are—(1) that of tenancies of middlemen and tenancies of cultivators,—a distinction derived from the nature of the tenants' interests—the one conveying a right to collect rents from the cultivators, and the other a right to the actual possession and cultivation of the soil, and (2) the distinction of statutory tenancies created by act of law, and contract tenancies created by act of the parties (*b*)

The term "tenancies created by act of law" is not, perhaps, quite accurate, for, at the present time at any rate, all tenants are let into the possession of their lands in the first instance by the act, or, at least, with the acquiescence of the landlord, but there are certain cases in which the law interferes between the parties after a certain length of possession, and gives the tenant a title to hold on in perpetuity on certain terms, irrespective of the terms of the original contract, and thus the tenant acquires a statutory title, and his tenancy may,

(*a*) *Gunga Gobind Mundul*.—Sutherland, P. C, 678 In this case the Privy Council ruled that there was no relation of landlord and tenant between the State as *Zamindar* of a *khas mehal*, (*i e*, one the proprietary right in which has not been granted to any private person,) and a tenant in perpetuity therein, which seems questionable

(*b*) Sections 48 52, Regulation VIII, 1793, treat of middlemen, and Sections 59 61 of *ryots* The distinction of statutory and contract tenancies is indicated in Sections 49, 50.

without any material inaccuracy, be called a "tenancy created by act of law." The title of a tenant, whose tenancy is created by contract or act of the parties, is good only against the landlord who created it and his representatives, but not against a purchaser of the landlord's estate when sold for arrears of Government revenue or rent due from it (*a*). On the other hand, the title of a tenant whose tenancy is created by act of law is good against all the world, auction-purchasers included. Tenancies created by act of law are necessarily tenancies in perpetuity, but contract tenancies may be of all degrees of duration. Another distinction between statutory and contract tenancies is, that in the case of the latter the rights and liabilities of the tenant, being determined according to the will of the parties by the terms of the contract, vary very considerably, whereas in the case of statutory tenancies the rights and liabilities of the tenant are recognised and prescribed by the law, and are therefore extremely uniform.

There are, in addition to the tenancies above described, two peculiar classes of tenancies, the nature of which is sufficiently indicated by their names;—the one, "Service tenancies," being held like the old feudal tenures by performance of services, and the other, "Mortgage tenancies," as security for loans. The names of the various tenancies met with in the several districts are very numerous, but it is believed that they will all find a place under some one or other of the heads of the above classification. They will be detailed in the following order:—

I. Tenancies of middlemen, statutory and contract.
II. Tenancies of cultivators, statutory and contract.
III. Service tenancies.
IV. Mortgage tenancies.

I.—Tenancies of Middlemen.

Names of Taluks.—The commonest name of middlemen's

(*a*) For the reason of this, see Chapter V.—Cancelment of tenancy by auction sale of superior estate for arrears.

statutory tenancies is *taluk*, though it should be said that some *taluks* are contract tenancies. The word means originally "dependence." It is found with numerous epithets. *Taluks* are named "*muzkuri*" or "*shikmi*," "*mufassil*" or "*shamili*," words equivalent to "dependent," to distinguish them from the *huzuri* or *kharija taluks* which pay revenue direct to Government. *Ausat* (*a*) is a word used in Backergunge to denote a subordinate *taluk*, and *nim ausat taluks*, a sub-division of *ausat taluks*, are also met with. *Ihtimam* is a name used of small *taluks* in Chittagong, though formerly applied to the large *zamindaris* of Burdwan and Rajshahye. *Hawala* is another Backergunge name for a small *taluk*, where *nim* or half *Hawalas* and *Chucks* are also heard of. A *Zimma* (*b*) is a tenure subordinate to a *Hawala*. The *Mukaddami* tenures (*c*) of Bhaugulpore and the *Mukarrari* tenures of Behar are also similar to *taluks*. So too is the *Upanchaki* tenure of Rungpore, a name said to be derived from *Panchaki*, a cess of one-fifth (*d*). The *Mukaddami* or *Sarbarahkari* tenure of Cuttack is another of the same nature (*e*). But it is worthy of note that the word *muzkuri*, when applied to these tenures, is used in the reverse of its usual meaning, as it signifies the proprietary tenures which pay revenue to Government, *zati* being used to express those which are dependent tenures paying rent to a *zamindar*. *Bekhbirt* is a name applied to *taluks*, often of a considerable size, in Sarun. A *Ganthi* (from a Sanscrit word meaning a knot or engagement) is another hereditary tenure met with in Nuddea. The tenure called *Birt ijara* has also been construed to be a heritable *istimrari* tenure (*f*). So too the *Mirasdari* tenure of Sylhet.

Statutory taluks.—The criterion of a statutory *taluk* is the

(*a*) Said to be derived from the Arabic *wast*, middle.

(*b*) *Ihtimam*, *Zimma*, and *Hawala* are all derived from Arabic words meaning "trust." See R. B., 17, May 13th, 1833.

(*c*) See II, S. R., 114.

(*d*) The quit-rent paid on a *ghatwali* tenure is called *Panchaki*.

(*e*) This tenure is also distinguished as simple and hereditary.—S. D., 1860, vol. 2, 109.

(*f*) I.. S. R.. 176.

fact of its standing against an auction purchaser of the superior estate, when that is sold for its own arrears of revenue. As will be seen hereafter, the ordinary rule is that when an estate is sold on account of arrears of its own revenue, for the due discharge of which it is hypothecated to Government, all under-tenures and encumbrances, of whatever nature, which have been created by the defaulter fall, and are cancelled from the day of sale. But the titles of *talukdars* whose *taluks* were in existence before 1793, in whatever way they originated, were ratified and guaranteed by the same law which recognised the proprietary title of the *zamindars* to their estates, and thus do not at the present time depend on the *zamindars'* titles, but stand on a firm statutory basis and ground of their own, and hold good in perpetuity, even after the cessation of the *zamindar's* title. Statutory *taluks* are held, some at fixed and some at a variable rent.

Istimrari mukarrari (*a*) *taluks existing in* 1793.—By Section 49, Regulation VIII, 1793, it was provided that *taluks* which had been held at a fixed rent for more than 12 years, previous to the Decennial Settlement (11th April, 1790), were not liable to be assessed with any increase either by the *zamindars*, or by the officers of Government, or *Sudder* farmers, in the event of the *zamindari* being let in farm (*b*), and Section 7, Regulation XLIV, 1793, expressly protected these *taluks* from cancelment and enhancement of rent, in the event of the *zamindari* being sold for arrears. *Taluks* granted after that date, though valid against the grantor and those claiming under him, would not stand against an auction-purchaser of the grantor's estate sold for arrears of revenue (*c*).

(*a*) *Istimrari*, from an Arabic word meaning "perpetuity," signifies 'perpetual;' *mukarrari* means 'at a fixed rent.' The revenue fixed at the Decennial Settlement was called *karar i-jama-dahsala*.

(*b*) Section 49 was in conformity with Section 76, which exempted the separated proprietary *taluks* from increase.—See I., S. R., 102, note. I., S. R., 302.

(*c*) See IV, S. R., 131; S. D., 1849, 113, 488, 1852, 499. Section 50, Regulation VIII, 1793.

These rules, however, are now obsolete, Act X, 1859, having considerably extended the number of statutory *istimrari taluks*. By Section 15 of that Act it is provided, that "no dependent *talukdar* or other person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and the *ryots*, who holds his *taluk* or tenure (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the Permanent Settlement (*a*), shall be liable to any enhancement of such rent." And by Section 37, Act XI, 1859, *istimrari mukarrari* tenures, which have been held at a fixed rent from the time of the Permanent Settlement, are protected from enhancement and cancelment by an auction-purchaser (*b*). It is obvious that Act X has much extended the number of statutory *taluks*, for whereas under the old law to support a tenancy of this nature it was necessary to prove a title to hold at a fixed rent, *and* continued holding on that title from a period 12 years antecedent to the Decennial Settlement, that is to say, from 11th April, 1778, it is now only necessary to prove payments of rent at a uniform rate from the date of the Permanent Settlement, *viz.*, 22nd March, 1793; the title of the original lessor and the nature of the original grant being entirely immaterial (*c*). In short, the tenure depends for its validity, not on the nature of the original lease, but on a new basis, *viz.*, the act of the law protecting it.

Twenty years' presumption.—The facility of proving a *taluk* to be *mukarrari*, or held at a fixed rent, has been further augmented by Section 16, Act X, 1859, which provides that, "whenever it shall be proved that the rent at which a *taluk* or other tenure is held has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that such *taluk* or tenure has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown, or it be proved

(*a*) 22nd March, 1793. See *Dhanpat Sing*, H. C., 5th May, 1864.

(*b*) See *A. Forbes*, H. C., 7th December, 1863.

(*c*) See *Ramnath Lall Bhakat*, H. C., 5th August, 1863.

that such rent was fixed at some later period." To raise this presumption, it is not necessary that specific proof should be given of the amount of rent actually paid in each of the twenty years. Any satisfactory evidence that the rent has not been changed during that time is sufficient (*a*). When this presumption arises, the onus of rebutting it is on the *zamindar*, even though he may be a recent purchaser, and may therefore have no knowledge of the antecedents of the tenure (*b*). A change in the rent of an undivided fractional portion of a *taluk* is equivalent to a change in the rent of the whole, and therefore rebuts the presumption (*c*). But a failure by the tenant to prove, under the old law, that his tenure was created before the Settlement does not annul the presumption (*d*), nor does an unexecuted decree for enhancement under the old laws (*e*). This Section applies only to the permanently settled provinces (*f*) and is therefore inapplicable to Cuttack.

Resumed lakhiraj istimrari mukarrari taluks.—Another peculiar species of statutory *mukarrari taluks* has been created by the Resumption laws. At the Decennial Settlement, all lands held *lakhiraj*, whether with or without due authority, were excluded from the assets on which the Settlement was based by Section 36, Regulation VIII, 1793, and in accordance with this rule Section 8, Regulation I, 1793, provided that the revenue arising from all resumed *lakhiraj* was to belong to Government. But this was modified by Section 6, Regulation XIX, 1793, which enacted that the revenue on resumed *lakhiraj* lands, not exceeding 100 *bighas* of the local measurement, whether lying in one village or more, provided it had been alienated by any one grant previous to 1st

(*a*) *Anand Mohan Ghose*, H. C., 11th August, 1864.

(*b*) *Dhan Singh*, H. C., 2nd March, 1864.

(*c*) *Muhammad Muddin*, H. C., 7th April, 1863.

(*d*) *Anand Mohan Ghose*, H. C., 11th August, 1864.

(*e*) *Gobind Chunder Dutt*, H. C., 15th January, 1866; *Ita anath Rai*, 14th June, 1866.

(*f*) *Mujibul Nissa*, N W. P, 6th November, 1861.

December, 1790, should belong to the *zamindar* or *talukdar* in whose estate or tenure the land was situated. Section 9 of the same Regulation provided that, on the resumption of such land, the *zamindar* should ascertain the produce of the land without subjecting the holder to any expense, and submit the accounts of it to the Collector, and that thereupon the Collector should fix the amount of rent to be paid for the lands in perpetuity on the principles laid down in Section 8. On the holder agreeing to pay this amount, he and his heirs and successors acquired a title to hold the lands as a dependent *taluk* in perpetuity, subject to the payment of such fixed rent. This species of *taluk* is not expressly mentioned in Section 37, Act XI, 1859, as protected from cancelment by an auction-purchaser, but there can be no doubt that it is so protected, as the tenure is not one created by the act of the defaulter since the settlement. *Muâafi* tenures, resumed and assessed in the North-Western Provinces under Regulation XXXI, 1803, are held to be exempt from enhancement (*a*.) It has been held that these tenures escheat to Government on failure of the heirs of the *lakhirajdar*, but Government will never enforce this claim against the *zamindars* (*b*).

Taluks existing in 1793, *but not held at a fixed rent.*—Section 37, Act XI, 1859, provides that *taluks* of this sort shall not be liable to cancelment on the occurrence of an auction sale of the superior *zamindari* for arrears, but that the rent shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures.

It was formerly ruled that absence of registration under Section 18, Regulation VIII, 1793, was sufficient to show that a *taluk* was not in existence at the date of the Permanent Settlement (*c*). But latterly a more liberal doctrine has been adopted, and it is now the rule that a tenant is not debarred from claiming

(*a*) *Girwar Singh*, N. W. P., 12th August, 1865.

(*b*) R. B., 13, January 23rd, 1838, New Rules, Chapter XVII, Section II, Clause 2.

(*c*) S. D., 1849, 411.

the privileges belonging to *taluks* in existence in 1793 by the *zamindar's* negligent or fraudulent omission to register the tenure under Section 48, if he can show by other evidence that it was in existence at that period (*a*).

There is much difference of opinion as to what evidence is necessary to prove the existence of a *talúk* in 1793. In one case it was said that the entry of a village as a *nij taluk*, in a certified copy of a quinquennial register of 1795-6, was by itself insufficient proof (*b*). In another case, relating to a *shamil taluk*, held at a rent of Sicca Rupees 661, and which rent it was sought to enhance to Co.'s Rupees 7,528, the Chief Justice considered that it might be presumed, from the great difference of the rent at which the lands were held, and the present value of the lands, that the occupation at this low rent must have continued for a very long time, and even from a period exceeding 12 years before the Decennial Settlement (*c*). This is somewhat similar to the English doctrine of "rankness" of a *modus* or customary payment. If a fee, alleged to be due of ancient custom, is found to be so high that it could not possibly have been paid in ancient times, it is said to be "rank," and the custom is held invalid, and in the case just cited this argument appears to be inverted, and it is argued that as the rent is low, it must have been fixed a considerable time back. The nature of the evidence necessary to establish the existence of a dependent *taluk* in 1793 was also discussed in a recent case before the Privy Council, in which what appears a most unsafe doctrine is laid down, *viz.*,—that leases and *sanads*, never produced or mentioned during a former litigation, may be credited when produced in a subsequent litigation (*d*). There is a special rule for the enhancement of the

(*a*) *Bhuban Mayi Debya*, Sutherland, P. C., 564. *Daya Mayi Chowdhrain*, H. C., 28th February, 1863. For Section 48, Regulation VIII, 1793, see Chapter II under Registration.

(*b*) S. D., 1819, 113.

(*c*) *Brijyungoma Dasya*, H. C., 24th April, 1863.

(*d*) *Hare v. Bhuban Mayi Debya*, Sutherland, P. C., 563.

rent of these *taluks*, which is given under the head of "Enhancement" in Chapter III.

Jungleburi taluks.—These *taluks* are, like the others, "statutory" or "contract," according as they were created before or after 1793, *i. e.*, according as the title of the tenant to hold on at the present time depends on the act of the law, or on contract. They are described in Section 8, Regulation VIII, 1793, as hereditary and transferable *taluks*, granted for the clearance of jungle land, at first rent-free, and after the expiration of a certain time subject to a specific rent on so much of the land as is brought into cultivation, the rent being adjusted according to *Pergunnah* rates (*a*). This description is taken, word for word, from an account of the *jungleburi talukdars* of Buzurg Umedpore in Dacca, given in the Board's Order of June 6th, 1791 (*b*). *Potitabad* tenures are very similar to these. *Aimas* are properly rent-free tenures, granted for charitable purposes, but it is stated in Section 9, Regulation VIII, 1793, that certain tenures called *malguzari aimas* were granted for the purpose of bringing waste lands into cultivation, and these were declared subject to the same rules as *jungleburi taluks*. The author of the Memoir above referred to states that *aima* tenures were generally grants of the revenue of cultivated lands (*c*). When waste lands were granted, the proprietary right in the land was also usually conveyed, and hence they were called *milki* or *madadmaash* (*d*). The *Muâfi istiwa* is another tenure of waste land granted at first rent-free, and subject to a quit-rent after a few years. The rules as to the enhancement of the rent of these *taluks* are given in Chapter III.

Contract taluks created since 1793.—For some time subsequent to 1793 it was illegal to create *taluks* under certain

(*a*) *Dhanpat Singh*, H. C., 5th May, 1864. III., S. R., 34.

(*b*) Peters, 7.

(*c*) *Altamgha* ("vermilion pencil" grants) was another name for these grants of revenue.

(*d*) Memoir, p. 3.

enactments, which will be detailed hereafter under the head of "Creation of Tenancy" in Chapter II. But these laws were repealed in 1812, and all *taluks* which had been created during the time they were in force were declared valid. *Taluks* created since 1793 are mere contract tenancies; they hold good only so long as the title of the grantor and his representatives lasts; and when that title is extinguished by a sale for arrears they are cancelled from the day of sale. A mere claim to hold as *talukdar* conveys no right to hold against an auction-purchaser, as will be more fully explained in Chapter V, under the head of "Cancelment of tenures by sale for arrears of revenue." The rules as to enhancement are given in Chapter III. A claim to be admitted to engage as *talukdar* with Government being *zamindar* of a *noabad* estate will not lie (*a*).

Putnee taluks are a species of contract *taluks* which originated on the estates of the Burdwan Rajah, after 1793. The preamble to Regulation VIII, 1819, describes it as a *taluk* granted by the *zamindar*, to be held at a rent fixed in perpetuity by the lessee and his heirs for ever. The lessee is required to furnish security. The main condition in the lease is that, in case of an arrear occurring, the tenure may be sold by the *zamindar*, and if the proceeds of the sale do not cover the balance, the remaining property of the defaulter is also liable to make good the arrear (*b*). An under-tenure created by a *Putneedar* is called a *Durputnee*, and a lease granted on similar terms by a *Durputneedar* is called a *Seputnee*. Section 3 of the same Regulation further declares *putnees* to be heritable, transferable, and answerable for the personal debts of the tenant in the same way as his other real (immoveable) property *Putneedars* may underlet, but such leases are not binding on the *zamindar* in the event of the tenure being sold for arrears. In the event of the tenure being sold for arrears, any excess in the proceeds of the sale, over and above the arrear due, is to be paid to the defaulter. By Section 4, *Durputneedars* and

(*a*) S. D., 1851, 572. See § 50, Reg VIII, 1793.
(*b*) S. D., 1858, 692. 1857, 1638.

Seputneedars possess all the rights and immunities belonging to *Putneedars* (*a*). Every right which a *zamindar* can exercise, except that of summary sale of under-tenures, passes to a *putneedar*, unless specially reserved in the lease (*b*). A *Putneedar* is ordinarily liable to pay the expense of *zamindari daks* (*c*). The rules as to sale of *putnees* will be found in Chapter III. There is much doubt as to the derivation of the word *putnee*. In Wilson's Glossary it is said that if written with the cerebral T it comes from *patta*, a lease. If with the dental T, from *pattan*, colonizing. The Sudder Court said it meant "settled," "constituted," evidently taking it from the latter (*d*). Harington also says it means "settled" or "established," and quotes a *putnee* lease which confirms this view, as it begins, "To *Khaitonath Ghose*." "Having established (*pattan*) you *Mufassil talukdar* of Lot——" (*e*).

Farms.—The common term for contract tenancies of middlemen is "farm," just as *taluk* is of their statutory tenancies. *Ijara* (from an Arabic word meaning price, hire) signifies a contract or farm of the rents of lands at a specific amount. *Thika* (from the Hindi *thik*, exact) means the same (*f*). *Kutkina* is a sub-lease granted by a farmer, or an under-farmer, at a rack-rent. *Durkutkinas* and *Durijaras* are also met with, being sub-leases granted by *Kutkinadars* and *Ijaradars* respectively. Farmers are called *Mustajirs*, *Thikadars*, *Ijaradars*, &c. In a paper furnished by *Gholam Hossain Khan*, author of the *Sair Mutakherin*, and son of the *Nazim* of Behar, to Sir J. Shore, about 1785, he says:—"The farming system is as it were selling the *ryots* and the

(*a*) *Ishwar Ghose*, H. C., 24th September, 1862.

(*b*) S. D., 1850, 498; *Gyaram Mundul*, H. C., 29th July, 1862. But see S. D., 1849, 66.

(*c*) Construction 1364.

(*d*) II, S. R., 94.

(*e*) Harington, III, 554, 519.

(*f*) In the Appendix to the Fifth Report of the Select Committee this word is spelt *tuckah*.

country to the farmers (*a*)," and it is believed that this opinion will be endorsed by every one who has considered the question. Even at the present time farmers sometimes take a lease of an estate at a rent equal to the entire rental paid by the *ryots*, trusting solely to their powers of exaction for a profit (*b*). One middleman between the *zamindar* and the *ryots* is the utmost that should be allowed. Generally speaking, farms are not transferable without the *zamindar's* consent. The rules as to transfer are given in Chapter VI. The tenancy called *Maurusi ijara* is a perpetual farm conveying a right of occupancy for ever at *Pergunnah* rates (*c*), but in the case of ordinary farms no length of occupancy will give the tenant a right to hold in perpetuity (*d*). It has been often decided that the provisions of Sections 5 and 6, Act X, 1859, do not apply to farmers (*e*). In the case of a lease for life it was held that repeated transfers of the rights of the lessee and length of possession formed no bar to the recovery of the possession of the lands by the lessor, or his representatives, at the lessee's death (*f*). The cases as to holding over and adverse possession are collected in Chapter V, under "Determination of tenancy by efflux of time," and the rules as to registration and protection against auction-purchasers further on in the same chapter. It has been held that, in the absence of specific contract, farmers are liable for the expenses of *zamindari daks* (*g*). It has been also ruled that middlemen cannot be fined under Section 17, Regulation XIX, 1814, for refusal to furnish accounts in *Butwara* cases (*h*), but

(*a*) Harington, III, 324.

(*b*) See Young's Revenue Guide, Chapter on *Putnees*.

(*c*) I., S. R., 140.

(*d*) S. D., 1849, 9; *R. Watson*, H. C., 5th January, 1865.

(*e*) *Hurishchundor Kundoo*, H. C., 12th May, 1863; *Norender Narain Bhup*, 10th July, 1863. *Bhairab Nath Sandyal*, 24th December, 1863, *Bindabun Chowdhry*, 4th January, 1864, *E. Gilmore*, 2nd June, 1864.

(*f*) VII, S. R., 94.

(*g*) VII, S. R., 310, S. D., 1854, 101.

(*h*) VII, S. R., 347.

this seems doubtful, as Section 29 especially names farmers. The word "farmer" is undoubtedly used in the Regulations of 1793 only of *Sudder* farmers, but in some of the later Regulations it certainly seems to mean "under" farmers (*a*).

II.—Tenancies of Cultivators or Ryots.

Names of ryotti tenancies.—The word *ryot* properly means "subject," and was so used by the Muhammadans. "All who reside within the limits of any person's territory" is the definition given by *Gholam Hossain Khan* (*b*). It is derived, according to Wilson, from an Arabic word meaning "to pasture," "to feed," "to protect." As applied to the agricultural classes, it means "the immediate occupant of the soil who personally cultivates the land" (*c*). But it is now settled that actual personal cultivation of the land is not always necessary to constitute a *ryot*. In a recent case it was said:—"It is difficult to lay down any general interpretation of the word *ryots*. As a general rule, they are the cultivating tenants; but they may not be cultivators at all themselves, they may cultivate their land by hired labor or by under-tenants" (*d*). Section 6, Act X, 1859, provides for the case of a *ryot* under-letting. In the case just cited it is also said that the size of the tenure is some criterion. It would seem from this that if a man hold land much in excess of the area that can be cultivated by a single family, he is not a *ryot*.

Khudkasht (from the Persian *khud*, and *kashtan*, to sow) is defined by Wilson to be a *ryot* who cultivates his own hereditary lands. Harington says the name is given "to those *ryots* who are inhabitants of the village to which the lands that they cultivate belong. Their right of possession, whether it arises from an actual property in the soil, or from length of occupancy, is

(*a*) See Harington, III, 466.

(*b*) Harington, III, 335. The Bengali *Praja* means the same.

(*c*) Report of Messrs. Anderson Crofts and Bogle, 25th March, 1788. Harington, II, 65.

(*d*) *Dhunpat Singh*, II C, 5th May, 1864

considered stronger than that of other *ryots*" (*a*). The latest definition of the term is "a *ryot* who was himself, or whose ancestors were resident cultivators at the time of the Permanent Settlement," and a *ryot* is said to be 'resident' when his homestead is situated in the village in which he cultivates land (*b*). The later Regulations appear to use the word simply in the sense of "resident" (*c*). *Kadimi*, ancient, and *maurusi*, hereditary, are terms often joined with *Khudkasht*, and by the former sale laws (XI, 1822; XII, 1841; I, 1845,) a distinction was made between ordinary *Khudkasht ryots* and *Kadimi Khudkasht* (*d*). A *kadim khudkasht ryot* was one whose title commenced before the Settlement, or, according to some authorities, any ancient tenant.

Pahikasht (from the Hindi *Pahi* for *pas*, near) is a *ryot* who resides in a village near the one in which he cultivates. They are regarded as tenants-at-will (*e*).

The *Thani*, or "resident" *ryots* of Cuttack, "appear to have possessed the right of occupying their fields from generation to generation, subject to payment of the revenue, and likewise enjoyed, free from assessment, the ground on which their houses

(*a*) Harington, II, 64. See quotations from Thomason, Holt, Mackenzie, Tod, Buchanan, and Malcolm, in Sir B. Peacock's and Mr. Campbell's judgments, 19th June, 1865. Lord W. Bentinck, in a Minute of 25th September, 1832, (Peters, 317) expresses an opinion that *khudkasht* ryots originally held a proprietary title in their lands. "All *ryots* who are looked upon as descendants or representatives of the original inhabitants, and even many more tenants of ancient date, are thought entitled to retain their land so long as they pay the customary rents." Each *ryot* was assessed according to the custom of the neighbourhood, and "the idea was thus kept up of a right of property on the tenant co-existing with an arbitrary power of increasing the rent."—Mill's Political Economy, Book II, Chapter IX, Section 4.

(*b*) S. D., 1860, 690.

(*c*) See Clause 3, Section 11, and Clause 5, Section 18, Regulation VIII, 1819. But a *ryot* whose holding commenced after 1790 could not claim the privileges accorded to *khudkasht ryots* by Section 60, Regulation VIII, 1793, S. D., 1853, 413. *Thakurani Dasya*, H. C., 19th June, 1865

(*d*) See Section 32, Regulation XI, 1822, S. D., 1856, 617, 628.

(*e*) Harington, II, 64.

were built, and a small portion surrounding it (*khana bari, khush bash*), and had the privilege of free pasture for the cattle employed in tillage, and the right of using the spontaneous productions of the waste for the construction and repair of their houses and implements of husbandry. But at the same time they were so heavily taxed that their tenures were without exchangeable value, and sales were unknown" (*a*).

Chappar band (from *chappar*, thatch) was an immigrant and settler in the village, who, according to some authorities, acquired a right of occupancy by prescription (*b*). The Benares Regulation LI, 1795, Section 10, expressly places *chappar band ryots* on the same footing as *khudkasht*. *Judeed*, or new ryots, appear to have been similar to *chappar band*.

Jamai signifies paying rent; Wilson says fixed rent, but this seems doubtful. *Dih kasht* corresponds to *khud kasht*. *Adhiar* and *Chikli* are names given to those who pay half the produce as rent. There are many names like these which will find a more appropriate place in Chapter II, under "Rent." Dr. Hamilton mentions a class of *ryots* in Behar called *Ashrafs* (gentlemen), who were allowed to hold at low rents (*c*).

The *Utbandi ryot*, met with in Nuddea, is a species of migratory tenant, and cultivates a different plot of land each year. Wilson also mentions a tenure called *Autbandi* (from *aut*, a plough), under which rent is assessed at a fixed rent *per* plough.

Kurpha is an under-tenant of a *ryot*, also called *Chukani* in Rungpoor, and *Prajali* (from *praja*), and generally *Shikmi* or *Petao ryot*. These under-tenants usually cultivate on the terms of paying half produce.

Dhotar is a ploughman's tenure in Purneah. The tenant finds his own plough and pays half produce. *Lagit* is a *ryot's* allotment of land. *Haziri nauabad* is a resident ryot in Purneah who takes

(*a*) Government Resolution, 1st August, 1822; Peters, 316. See also Stirling's Essay on Orissa, in Vol. XV of "Asiatic Researches," quoted in Briggs, 73.

(*b*) Peters, 317.

(*c*) Briggs, 219.

up new land for the first year, and if he holds more than one year he is called *Haziri sabik*. *Kursa zamin* is a Backergunge tenure. *Jotedar* is perhaps the commonest name for a cultivating tenant in Bengal, as *Kashtkar* and *Asami* (*a*) are in Behar. Some of the Rungpore *jotedars* hold very large areas of land, and are middlemen tenants in all but the name. *Jote* means a ryot's tenancy.

Statutory tenancies of ryots under the old law.—All the old sale laws from Regulation XLIV, 1793, downwards protected *khudkasht ryots* against auction-purchasers. The essential characteristic of this tenure was that it conveyed a right of occupancy in perpetuity (*b*), either at a fixed rent or at *Pergunnah* rates. If the *khudkasht ryot* had held at a fixed rent from twelve years before the Decennial Settlement, he was entitled to continue to hold at that rent (*c*), otherwise he was entitled to hold at "fair and equitable" rates, also called "customary," "established," and *Pergunnah* rates, and the *onus* of proving a claim to enhance rested on the landlord (*d*). Strictly speaking, all *ryots* but *khudkasht, i.e.*, those who had held land uninterruptedly from the time of the Permanent Settlement, were left by the old law on the footing of mere contract tenants (*e*). But as there were various other classes of *ryots* who, by virtue of rulings of the Sudder Court, were declared entitled to rights of occupancy at *Pergunnah* rates, it will be well to mention them. It was held in several cases that a right of occupancy was gained by prescription (*f*), or twelve years' limitation. A *ryot* who has been in possession for twelve

(*a*) Mr. Elliot thinks that "*asami*" has come to signify an individual tenant from the heading of the register in which the names of the villagers were recorded,—*Asam* (*phe* of *is m*) meaning names, Wilson, 35.

(*b*) S. D., 1857, 624; 1850, 490.

(*c*) *Rameshur Chunder Dutt*, H. C., 4th May, 1864; S. D., 1851, 764; S. D., I., 1860, 698

(*d*) Section 60, Regulation VIII, 1793, Sections 6 and 7, Regulation IV, 1794; Sections 6 and 7, Regulation V, 1812; Constr. 234; S. D., 1850, 8, 903; S D., 1860, Nov., 317.

(*e*) S. D., 1855, 589.

(*f*) S. D., 1849, 411; S. D., 1855, 253.

years cannot be ejected, it was said, if he is willing to pay a fair rent (*a*). This doctrine has recently been questioned by high authority, but it may be observed that it is strictly in accordance with the ancient custom under which *judeed ryots* obtained a right of occupancy. It is stated by Colebrooke that both by Hindoo and Muhammadan law, as well as by the legal practice of the country, twelve years was considered sufficient to establish a right by prescription (*b*). It has been also held that the first settlers (*abadkars*) on new alluvial land acquire a right of occupancy (*c*). And it has further been ruled that dispossessed *zamindars*, *lakhirajdars*, and others possess a right of occupancy in their *nij jote* land (*d*). The cases are collected in Chapter V, under "Auction Sale." However, these rulings are now probably obsolete; the only *ryotti* statutory tenancies now recognised being those mentioned in Act X, *viz.*, rights of occupancy at fixed and at fair rates (*e*).

Rights of occupancy at fixed rates under Act X.—By Section 3 of Act X it is provided that "*ryots* who now hold lands at fixed rates of rent, which have not been changed from the time of the Permanent Settlement, are entitled to receive *pottahs* at those rates," and Section 37, Act XI, 1859, protects "*ryots* having rights of occupancy at a fixed rent" against auction-pur-

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(*a*) S. D., 1853, 778. See *Ishwar Ghose*, H. C., 17th March, 1864.

(*b*) Digest, Vol. III, p. 4.

(*c*) S. D., 1851, 25. See S. D., 1859, 1546. It is said by *Manu* that "cultivated land is the property of him who cuts away the wood, or who cleared and tilled it," and the Muhammadan law was the same.—Baillie's Land-tax, Chapter 6, para. 42.

(*d*) See V, N W. P., 114; S. D., 1858, 346, 886; 1859, 1456, 1856.

(*e*) These new statutory tenancies were created by the Legislature under the power reserved by Section 8, Regulation I, 1793, of enacting "such regulations as might be necessary for the protection and welfare of the *ryots*," or, to use the words of the Directors' despatch, "such as might be necessary to prevent them from being improperly disturbed in their possession, or loaded with unwarrantable exactions."—Harington, II, 189.

chasers. In a case decided in 1862 (*a*), the High Court ruled that this tenure would not hold good against an auction-purchaser under the old sale law (I, 1845), as Section 26 of that law did not protect them. In this ruling the Court overlooked the fact that Section 26, Act I, 1845, had been declared "subject to the modifications created by Act X of 1859"(*b*), and it has since been settled by a Full Bench decision that these tenures are valid against purchasers under the old sale law (*c*). As the validity of this tenure arises, not from the act of the lessor, but from the act of the law, the nature of the original *pottah* is entirely immaterial, and transfers of possession do not destroy the title (*d*).

To give a right under this Section, *three* things are necessary:—

1*st*.—The claimant must be a *ryot*, and hence when the plaintiff was called in his lease a *mustajir*, and his holding was extensive, he acquired no right under this Section (*e*); and the Agra Court have held that an ex-proprietor continuing to cultivate lands as a *ryot*, cannot reckon the years antecedent to the sale of his rights during which he held as *malik* (*f*). A sharer occupying land as a *ryot* under agreement with the other sharers acquires no right under this Section (*g*).

2*ndly*.—It is necessary that the holding should have been from the time of the Permanent Settlement, *viz*., 22nd March, 1793 (*h*). An illegal eviction, though it puts an end to the *ryot's* possession, does not annul his tenure (*i*), nor does a refusal on

(*a*) *Lutifunissa*, H. C., 22nd August, 1862.

(*b*) Section 1, Act X, 1859.

(*c*) *Sadik Sircar*, H. C., 31st January, 1866. *Harihar Mukherjya*, 22nd February, 1867, F. B.

(*d*) *Ramnath Lall Bhakat*, H. C., 5th August, 1863.

(*e*) *Dhanpat Singh*, H. C., 5th May, 1864.

(*f*) *Ramnarain Singh*, N. W. P., 10th August, 1861.

(*g*) *Raghubans Tewary*, H. C., 5th April, 1865.

(*h*) *Dhanpat Singh*, H. C., 5th May, 1864.

(*i*) *Lutifunissa*, H. C., 26th March, 1863.

the part of the landlord to accept rent (*a*). The division of the holding among heirs, each one of them paying his rent separately with the landlord's consent, is not necessarily the commencement of new tenancies. But if one of the sharers default, the tenure of all is vitiated (*b*).

3rdly.—The rent must have been unchanged throughout the time. A change in the rent of a fractional part of an undivided tenure is a change in the rent of the whole tenure (*c*), unless the rent of the whole tenure is unaffected by it (*d*). A trifling unexplained addition to the total rent is no change within the meaning of this Section (*e*). Nor is an increase of rent on account of additional lands, nor the exaction of an illegal cess such a change (*f*). The consolidation of several *jamas* into one by a Government Settlement Officer, and the omission of fractions from the rent, does not amount to such change (*g*). When the lands of two separate estates have become intermixed, and the owners of both estates collect their rents in fixed shares from all the *ryots*, on all the lands, the admitted *status* of a *ryot* in relation to the owners of one estate is not sufficient proof of his *status* in regard to the owner of the other estate (*h*). A fixed proportion of the produce is not a fixed rate of rent within the meaning of this Section (*i*). This Section makes no exception in favor of *khamar* lands (*j*).

(*a*) *Gyaram Dutt*, H. C., 10th February, 1865.

(*b*) *James Hills*, H. C., 9th August, 1864; 6th July, 1865.

(*c*) *Muhammad Muddin*, H. C., 7th April, 1863.

(*d*) *Gopal Chunder Ghose*, H. C., 5th July, 1865.

(*e*) *Anand Lall Chowdhry*, H. C., 22nd November, 1865. *Mansur Ali*, 19th March, 1867.

(*f*) *Samiruddin*, H. C., 7th April, 1865.

(*g*) *Sukimani Haldar*, H. C., 25th July, 1864.

(*h*) *Shibnarain Ghose*, H. C., 26th November, 1864.

(*i*) *Muhammad Yakub*, H. C., 16th November, 1865. (A questionable ruling. Section 2, Act X, recognises rents in kind as well as money rents, and Section 3 is not expressly limited to money rents).

(*j*) *Ramkumar Mukherjya*, H. C., 22nd December, 1864.

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Twenty years' presumption.—As to the proof of this tenure, Section 4, Act X, provides that "whenever, in any suit under this Act, it shall be proved that the rent at which land is held by a *ryot* has not been changed for a period of 20 years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some later period." To raise this presumption, it is, strictly speaking, necessary that the *ryot* should allege a holding from the time of the Settlement (*a*). But in several cases a plea of holding from an indefinite period has been considered sufficient (*b*). If, however, the plea be that the *ryot* has held for a long time, and a *pottah*, dated subsequently to the Settlement, be filed in proof of it, the evidence of course annuls the presumption, as it shows the holding commenced after the Settlement (*c*). But if the terms of the *pottah* show that it was granted in confirmation of pre-existing tenancy, it would not annul the presumption (*d*). A Full Bench has decided that a *pottah* of date earlier than the Permanent Settlement, or alleged to have been granted in confirmation of such a previous *pottah*, may be set up without imperilling the presumption of this Section (*e*). If the allegation be that, although the circumstances of a tenure have changed since the Permanent Settlement, yet the condition of Section 3 has been fulfilled, the presumption does not arise, and the issue to be tried will be whether the condition of Section 3 has been fulfilled or not (*f*).

(*a*) *Niyamutulla*, H. C., 16th November, 1865.

(*b*) *Manmohan Ghose*, H. C., 27th January, 1865. *Jagamohun Dass*, 5th July, 1865. *Radhanath Sircar*, 2nd August, 1865. *Rakhal Dass Tewary*, 8th March, 1867.

(*c*) *Riazunissa*, H. C., 30th November, 1863. *Manmohan Singh*, 12th August, 1862. *Ramkisto Sircar*, 31st March, 1864. *Ramnarain Singh*, 24th June, 1864.

(*d*) *Bhairubnath Sandyal*, H. C., 2nd July, 1864. See *Kishtomohan Ghose*, 30th November, 1865.

(*e*) *Grish Chunder Bose*, H C., 31st August, 1866, F. B.

(*f*) *Ramkumar Mukherjya*, H. C., 5th January, 1865

On failure to prove a *pottah* granted since the Settlement, the *ryot* cannot fall back on the presumption (*a*). He can only fall back on his title as admitted by his landlord (*b*).

As to the proof of uniform payments, it has been held that payments for 20 years at a uniform rate must be proved by full legal evidence, and cannot be presumed from any evidence, however strong (*c*); not even from evidence that the rent paid at the commencement of the suit was the rent paid more than 20 years back (*d*). The deposition of the *ryot* and of one witness is not sufficient proof (*e*). But if by evidence, direct or indirect, the holding at a uniform rate is proved to the satisfaction of the Court, that is enough (*f*). Inability to prove the precise amount of rent paid in each of the 20 years does not vitiate the presumption (*g*).

As to rebutting the presumption, it has been held that when the presumption arises the landlord should have an opportunity given him of rebutting it (*h*). If the landlord can show that the *ryot's* title commenced at a date subsequent to the Settlement, that is enough to rebut the presumption, even though it be not shown that the rent of the land was at the same or any other period altered (*i*). A summary decree for enhanced rent, subsequently revised, is no proof of change of rent (*j*). And the absence of mention of the tenure in old *jama-wasil-baki* papers is not sufficient to rebut the pre-

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(*a*) *Umesh Chunder Biswas*, H. C., 8th January, 1864.

(*b*) *Padmalochan Lahuri*, H. C., 5th April, 1866.

(*c*) *Rajnarain Rae*, H. C., 27th August, 1864.

(*d*) *Kanakmani Debya*, H. C., 6th July, 1865.

(*e*) *Harachundor Mukherjya*, H. C., 5th June, 1866.

(*f*) *Radhanath Sircar*, H. C., 2nd August, 1865.

(*g*) *Kathyani Debya*, H. C., 11th February, 1865.

(*h*) *Beni Ram*, H. C., 25th July, 1864.

(*i*) *Ramlall Ghose*, H. C., 2nd April, 1863. But see *Ramnath Loll Bhakat*, 5th August, 1863.

(*j*) *Jaikishwari Debya*, H. C., 27th July, 1866.

sumption (*a*). A recorded failure by a *ryot* in times past to prove a tenure at fixed rates does not deprive him of the right to this presumption (*b*).

Rights of occupancy at fair rates (*c*).—Section 6, Act X, provides that—"Every *ryot* who has cultivated or held land for a period of twelve years has a right of occupancy in the land so cultivated or held by him, whether it be held under *pottah* or not, so long as he pays the rent payable on account of the same, and the holding of the father or other person from whom a *ryot* inherits shall be deemed to be the holding of the *ryot* within the meaning of this Section." "But this rule does not apply to *khamar* (*d*), *nij-jote*, or *sir* land belonging to the proprietor of the estate or tenure, and let by him on lease for a term, or year by year, nor to lands sublet for a term, or year by year, by a *ryot* having a right of occupancy." Nor (Section 7) to lands let out under any written contract which contains any express stipulation contrary thereto. By Section 5—"*Ryots* with rights of occupancy are entitled to receive *pottahs* at fair and equitable rates, and in case of dispute the rent previously paid shall be deemed to be fair and equitable, unless the

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(*a*) *Ramlochan Gupt*, H. C., 13th December, 1866.

(*b*) *Ishan Chunder Bhuttacharjya*, H. C., 3rd December, 1864.

(*c*) "Resident" was the word used in the original draft of the Act to define *ryots* having a right of occupancy. But as the North-West Board pointed out that residency was not always a condition of rights of occupancy, it was provided, in accordance with an order of the N. W. P. Government of 17th September, 1856, that a holding of the same land for twelve years should give a right of occupancy.—Sir B. Peacock's Minute, dated 31st March, 1864.

(*d*) *Khamar* means properly lands originally waste, but brought into cultivation by the *zamindar*. It is usually applied to the lands which the *zamindar* retains in his own hands, and cultivates either by hired labor or by tenants-at-will, paying half the produce as rent. *Sir*, *nij-jote*, and *zeraat* are other names for this land. It corresponds to the home farm of an English manor, the major part of which is held by copyholders.—See III, Harington, 399, and Mr. Seton-Karr's Minute, 2nd January, 1864.

contrary be shown in a suit by either party under the provisions of this Act." By Section 37, Act XI, 1859, "*Ryots* having rights of occupancy at a rent assessable according to fixed rules under the laws in force" are protected against auction-purchasers. Some doubts were expressed as to this at one time (*a*), but it has since been fully decided that rights of occupancy are valid against auction-purchasers (*b*), and there can be no question that this decision is correct. Whenever a right of occupancy is transferable, it would seem that the purchaser acquires the same right of holding in perpetuity which was possessed by his vendor (*c*).

No tenants but *ryots* can acquire a right of occupancy by twelve years' holding. It has been repeatedly held that middlemen, or "persons holding an interest in land intermediate between the *zamindar* and the *ryot*," as they are termed in Act X, cannot acquire a right of occupancy in this way (*d*). When it appeared that the tenants had held as farmers for 40 years, it was held that, in the absence of proof that they had ever themselves cultivated the lands, this would not give them a right of occupancy (*e*). Two persons cannot hold the same land in separate right as *ryots* (*f*).

It is settled law in the Lower Provinces that a trespasser cannot acquire a right of occupancy. When a ryot obtained a lease for a term of five years from 1261 to 1266 *Mulki*, and continued in occupation beyond the term, it was held by a Full Bench that if he held over without the consent of the landlord he was a trespasser,

(*a*) Sir B. Peacock's Minute, 31st March, 1864. *Ishwar Ghose*, H. C., 17th March, 1864.

(*b*) *Debi Bhakat*, H. C., 12th July, 1864.

(*c*) See *Nund Kumar Mundal*, H. C., 19th July, 1863.

(*d*) *Hurrish Chunder Kandoo*, H. C., 12th May, 1863. *Norender Narain Bhup*, 10th July, 1863. *Tikam Singh*, N. W. P., May 11th, 1863.

(*e*) *Bindabun Chunder*, H. C., 4th January, 1864.

(*f*) *Bhairubnath Sandial*, H. C., 24th December, 1863. But see *Gouri Prosad Doss*, 3rd August, 1866, and *Kauri Lall Thakur*, 4th June, 1867.

and that occupation by a trespasser did not convey a right of occupancy (*a*). It has also been held that persons holding over after the expiry of a lease acquire no right of occupancy (*b*). This appears rather too widely stated, as if the landlord sanctions or even acquiesces in the holding over, the tenancy continues, even though the original term may have expired. But of course when a *ryot* has once denied his landlord's title by setting up a plea of adverse possession, he cannot afterwards claim a right of occupancy (*c*). The Western Court ruled, when a ryot had held land for 20 years under a lease originally granted for three years by a sub-lessee, and which lease had never been formally renewed, that a right of occupancy had accrued (*d*).

In one case it was held that a right of occupancy cannot accrue under a lease granted by a manager of an attached estate (*e*), which seems a most extraordinary ruling, as a right of occupancy is a statutory tenancy accruing by the mere act of the law from twelve years' occupation of land, and (as has been decided in other cases) the nature of the landlord's title at the time it accrues is perfectly immaterial. The ryot's title does not depend in any way on the landlord's. Service tenants may obtain a right of occupancy (?) (*f*). A cultivating *ex-malik*, who has continued to hold his former *sir* land for twelve years after the sale of his proprietary rights, acquires a right of occupancy (*g*). A holding for more than twelve years under a lease conveying the right of cutting grass and reeds on the waste gives no right of occu-

(*a*) *Pir Buksh*, H. C., 8th March, 1864, F. B. *Sadha Jha*, 2nd February, 1866. *Mulki* is the Purneah era, it commences in *Srabon*.

(*b*) *Bansi Dhar Dass*, H. C., 19th December, 1862. *G. Gilmore*, 2nd June, 1864.

(*c*) *Nadir Beg*, H. C., 4th January, 1865. *Sitanath Rai*, 12th February, 1867. See *Addmar Singh*, 28th August, 1865

(*d*) *Ganesh Singh*, N. W. P., 3rd May, 1862.

(*e*) *Sookopal Pal Chowdhry*, H. C., 20th November, 1865.

(*f*) *Jardine, Skinner and Co.*, H. C., 6th June, 1866.

(*g*) *Chowkaryadyal Tewary*, N. W. P., 20th May, 1864.

pancy (*a*). Rights of occupancy cannot accrue upon *sir* land (*b*). Rights of occupancy cannot accrue under a lodging-house (*basha bari*) lease (*c*).

As to conditions against a right of occupancy, it has been held that a lease for a term of years does not bar a right of occupancy, unless it contains an "express stipulation" to that effect (*d*.) This case appears to overrule a former decision to the contrary (*e*). In another case it was said, if a lease for a term is plainly intended to fix the term of the holding, and not only to fix the rent for the term which it specifies, it bars the right of occupancy (*f*). These Sections do not apply to suits commenced before Act X came into force (*g*).

As to the limitation of the rent, it has been said that, "the recognition of a right of occupancy in the *ryot* implies necessarily some limit to the discretion of the landholder in adjusting the rent of the person possessing such a right" (*h*). The English tenure, which most nearly resembles the right of occupancy, *viz.*, the copyhold tenure, is, strictly speaking, subject to the payment of fines of an arbitrary amount. But just as

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(*a*) N. W. P., 18th August, 1865, F. B.

(*b*) *Hingun Singh*, N. W P., 10th May, 1862. *Tekayut Rai*, 20th January, 1862.

(*c*) *Kalikishen Biswas*, H. C., 24th July, 1867.

(*d*) *Shibdyal Palit*, H. C., 10th February, 1865. *Padma Mani Dasya*, 22nd March, 1867.

(*e*) *Hurrish Kundu*, H. C., 12th May, 1863.

(*f*) *Adit Narain Singh*, H. C., 28th August, 1865. It would seem that a lease for a term must always be intended to fix the term.

(*g*) *Bungshidhur Dass*, H. C., 28th October, 1862. *Lallmani*, 17th January, 1863. In S. D., December, 1861, it was said that Section 6 can have no retrospective operation, but this has been overruled by the judgment in *Thakurani Dasya*, H. C., 19th June, 1865, F. B.

(*h*) Report of Select Committee on Act X. The strongest advocates of the *zamindar's* proprietary title, Sir J. Shore and Lord Cornwallis, both admitted the "absolute necessity" for some interposition between the *zamindars* and their tenants" to prevent undue exactions.—Fifth Report, 601, 615.

the law has tied down occupancy rents to a "fair and equitable amount," the English Courts have decided that copyhold fines must be "reasonable" in amount, as otherwise the fines might be so excessive as to amount to a "disherison of the estate" (*a*). The rulings as to the amount will be given in Chapter III, under the head of "Enhancement," as it is in connection with enhancement suits that the subject is usually brought to notice. The rulings as to transfer of rights of occupancy will find their most appropriate place in Chapter VI, on assignment.

Contract Tenancies of Ryots.—All other *ryots*, besides the two classes of statutory tenants just described, have no rights whatever independently of those which they derive from the act of the landlord under contract. By Section 8, Act X, they are entitled to hold only at such rates as may be agreed on between them and their landlords, and consequently cannot claim a *pottah* at all, unless they agree to the rate of rent demanded by the landlord (*b*). And by Section 76, Act X, the term of the *pottah* is also exclusively in the discretion of the landlord. Hence the terms of these tenancies are matters of much variety, depending as they do on the agreements made in each instance, though still there are some general rules which circumscribe the ordinary licence of contract, and govern all such cases as are not expressly provided for.

Contract tenancies are usually distinguished from one another by the duration of the term. Tenancies in perpetuity, granted after the Permanent Settlement, are valid only against the grantor and those claiming under him, not against an auction-purchaser of the grantor's estate sold for arrears of revenue (*c*). Leases for life hold good only during the life of the lessee, though they may have been frequently transferred during the

(*a*) Williams, Real Property, 323; I, Stephen's Blackstone, 227.

(*b*) *Kissensukha Mukherjya*, H. C., 3rd March, 1863. *Ghour Baksh*, N. W. P., 19th March, 1862.

(*c*) *Radha Kant*, H. C., 21st July, 1864.

period (*a*). The descendants of a *ryot* who held a *mukarrari pottah* for life, granted after the settlement, have nothing more than a right of occupancy (*b*). A tenancy for a term of years in like manner holds good for that term, provided the grantor's title be not sooner extinguished by a sale for arrears. A "tenancy at will" is where the lease is for no certain term, but is to continue during the joint will of both parties (*c*). And such a tenancy can be determined by the landlord or tenant at any time.

The Courts formerly construed the common indefinite (*Bemeiyadi*) leases as conveying a tenancy of this nature, but as this leaves the tenant too much at the mercy of the landlord, they have latterly, following in the wake of English precedents, been wont to construe these leases as conveying a tenancy "from year to year." In English law, a lease at an annual rent, made generally, without stating it to be at will, and without limiting any certain term, is held to be not a lease at will, but from year to year (*d*). And in like manner the common indefinite leases of this country are now considered to convey a yearly tenancy (*e*). And even when there is no written lease at all, and the tenant holds under a mere verbal contract, it has been held that he cannot be ejected till the close of the year (*f*). Indefinite leases have sometimes been held to convey a tenancy for life, or in perpetuity even, but it is now fully settled that this is erroneous (*g*). An indefinite lease, it has been said, must be considered as only extending from year to year, and the tenancy

(*a*) VII., S. R., 94; V., S. R., 205.

(*b*) *Ramnarain Sing*, H. C., 24th June, 1864.

(*c*) S. D., 1851, 120. H. C., 9th February, 1863.

(*d*) Williams, Real Property, 353. See *Clayton vs. Blackey*, II, Smith, L. C., 97.

(*e*) *R. Watson*, H. C., 5th January, 1863. *Ramgobind Manjhi*, 17th January, 1863.

(*f*) *R. Watson*, H. C., 10th April, 1863.

(*g*) *Mothura Mohan Sha*, 27th July, 1864. See VI, S. R., 49.

expires at the end of the *Fasli* year (*a*), in which notice to quit, or notice of relinquishment is given. In the absence of such notice, a tacit renewal from year to year would be understood. But no time could give it permanency in the absence of an express stipulation (*b*). It is for the tenant holding under such a lease to prove it permanent, not for the landlord to prove it temporary (*c*). A lease which fixes the rent, without specifying any term, has no effect upon the duration of the holding (*d*).

A tenancy "on sufferance" is mentioned in some cases (*e*). It is defined to be where a tenant comes in by right and holds over without right. This species of tenancy is said to have been invented in English law for the purpose of preventing "adverse possession" from taking place when a lease is determined without the knowledge of the landlord (*f*). The cases as to holding over and adverse possession will be given in Chapter V under the proper head; and the rules as to the enhancement of the rent of *ryotti* contract tenancies in Chapter III, under "Enhancement."

III.—Service Tenancies.

Ghatwali tenures are held by payment of a certain quit-rent, and by performance of certain Police duties, *viz.*, the protection of *ghâts* or passes from the attacks of the hillmen and other turbulent characters (*g*). The tenure resembles the old feudal tenures in more than one point. Though heritable, it is not capable

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(*a*) The *Fasli* or 'harvest' era was invented by *Akbar*, and is in force in Behar. It is 593 years behind the Christian era. It properly begins in *Asin*, but in practice it is supposed to commence in *Byaakh*.

(*b*) *Tikam Singh*, N. W. P., 11th May, 1863. See S. D., 1858, 738, 778.

(*c*) *Gurdial Singh*, N. W. P., 27th October, 1865, S. D., 1866, 62.

(*d*) *Radha Sundari Guptea*, H. C., 27th July, 1865.

(*e*) S. D., 1859, 1576.

(*f*) Smith, 26.

(*g*) *Lilanund Singh*, Sutherland, P. C., 248. Moore, VI., 120. See VI., S. R., 170.

of alienation (*a*), nor liable to attachment for the personal debts of the tenant for the time being (*b*), just as feudal tenures were inalienable up to the reign of Edward I (*c*). And, further, on the death of the tenant, the tenure is not divisible amongst all his heirs, but devolves entire on the eldest son (*d*). The reason of these restrictions is, that the main object of the tenure is the performance of the service, and that this object would be frustrated if it were allowed to be split up amongst a number of petty holders.

There is a special law for the Beerbhoom *Ghatwals*,—Regulation XXIX, 1814,—which, however, only relates directly to those of *Pergunnahs* Singhat and Deoghar (*e*). Section 1 states that, according to the usages and constitution of the country, these *Ghatwals* are entitled to hold their land in perpetuity, subject to the payment of a fixed rent to the *zamindar* of Beerbhoom, and to the performance of certain Police duties. By Section 2 they are declared entitled to remain in possession so long as they shall pay the fixed rent, and this rent is not to be enhanced so long as it continues to be punctually paid, and the Police services are duly performed. By Section 3 the lands are to be considered a portion of the Beerbhoom *zamindari*, but the rents are to be paid to the Collector at Soory, and (Section 4) the difference between the amount of rents paid by the *Ghatwals*, and the amount of Government revenue assessed on this portion of the Beerbhoom *zamindari*, is to be paid to the *zamindar*, his heirs and successors, in perpetuity. By Section 5, should a *Ghatwal* fall in arrear with his rent, it shall be competent to the Governor-General to cause his tenure to be sold in the same manner

(*a*) *Deputy Commissioner of Beerbhoom*, H. C., 27th August, 1862.

(*b*) S. D., 1853, 900. *Kustura Kunwarj*, H. C., 13th September, 1865. But surplus proceeds of the tenure may be attached.

(*c*) Williams, Real Property, 18.

(*d*) VI, S. R., 169; S. D., 1853, 765. But after resumption the lands descend under the ordinary law. *Prithi Singh*, H. C., 27th July, 1867.

(*e*) Harington, III, 509.

as *zamindaris* are sold, or to transfer it to another tenant (*a*) at the same or on increased rent, or to dispose of it in such manner as he may think proper. If any increase of rent is obtained by these arrangements, such increase is to go to the *zamindar*.

There are several rulings relative to resumption of these tenures. In one case Government preferred a claim to resume a *Ghatwali* tenure of considerable extent in Khurruckpore, *Zillah* Bhaugulpore, on the ground that it was land granted for Police establishments, and therefore subject to resumption under Clause 4, Section 8, Regulation I, 1793, which provides that "allowances made to *zamindars*, in the adjustment of their *jama*, for keeping up *thanas* or Police establishments" shall be subject to resumption. But the Privy Council, finding that the lands were granted as part of the *zamindari* of Khurruckpore in 1790, and were included in the settlement of that estate, and covered by the *jama* assessed upon it, and also that the Collector of Bhaugulpore in 1794 expressly reported that no allowances had been made to any *zamindar* in that district for keeping up a Police establishment, decided that they could not be regarded as properly falling within the meaning of the clause cited (*b*). But it was said in the decision that if any case should occur in which *Ghatwali* lands had been dealt with as falling within the meaning of this clause, and had been excluded from the settlement of 1793, such case must be dealt with upon its own circumstances, and would not be governed by the decision in this case. It may be observed that *Ghatwali* lands were formerly considered to be Police lands. Harington expressly states that one of the main distinctions between *Ghatwali* and *Chakeran* tenures was that, whereas *Chakeran* lands were included in the assessment by Section 41, Regulation VIII, 1793, allowance was made to

(*a*) This power of transfer is not effected by a tender of payment after date. *Shambodha Singh*, H. C., 21st November, 1862. Ghatwals are liable to dismissal for neglect of duty. S. D., 1857, 1812.

(*b*) *Lilanund Singh*, Sutherland, P. C., 248.

zamindars on account of the low quit-rents paid by *ghatwals*, for which reason also he says *ghatwali* tenures cannot be resumed by *zamindars* (*a*). The question of the right of Government to resume cannot therefore be considered finally settled.

As to the *zamindar's* right to resume these tenures, it has been said that, so long as Government requires the services of the *ghatwals*, the *zamindar* is not competent to resume the lands, but if at any time the services of the *ghatwals* be no longer required the lands will lapse to the *zamindar* (*b*). In a later case, in which the *ghatwals* had arranged to pay Government a sum of money in lieu of the services, it was held that, as there was no misconduct or default on the *ghatwal's* part, the tenure was not liable to resumption (*c*). Government has such an interest in these lands as entitles it to be made a party to any suit to resume them (*d*). In another case it was said that the *ghatwal* cannot plead limitation against his landlord. *Ghatwali* tenures are essentially distinct from the dependant *taluks* mentioned in Regulation VIII, 1793. The latter are assumed to be held at their full value till the contrary is proved, whereas *ghatwali* tenures are expressly granted at a peppercorn rent in consideration of the tenant performing certain services. The rent is merely imposed to preserve the connection of the tenure with the parent estate, and to show that it is part and parcel of the latter. Hence when a *ghatwal's* services are dispensed with, limitation cannot be pleaded in answer to a suit for possession by the *zamindar*, and nothing in Regulation VIII, 1793, will protect the tenure from enhancement (*e*). A *ghatwal* who has usurped lands in excess of the quantity specified in his *pottah*, acquires no greater right in the lands so occupied than an

(*a*) III, Harington, 511. Letter of *Nizamat Adalut*, 30th October, 1816. The probability is that allowance was made in both cases.

(*b*) S. D., 1858, 669. See H. C., 27th August, 1862

(*c*) *Man Manjan Singh*, H. C., 17th June, 1865.

(*d*) S. D., 1859, 537

(*e*) S. D., 1857, 1812.

ordinary *talukdar*, and his possession of such lands can never become adverse to the landlord so as to support a plea of limitation against him when he sues to assert his proprietary right (*a*). On the other hand, it has been ruled that if the usurped lands have been held as part of the tenure for 60 years, suit is barred (*b*). Suit to recover lands usurped by a *ghatwal* in excess of his tenure will not lie under Act X, but in the Civil Court (*c*).

Chakaran land (*d*) is a generic term for service tenures, *viz.*, land held either rent-free or at a nominal rent by public officers or private servants in lieu of wages. The names of the various *chakaran* tenures are very numerous. The village watchmen and *zamindari* servants, known under the various names of *Chokidars*, *Pasbans*, *Gorayats*, *Pharidars*, *Foujdars*, *Digwars*, *Balagushti* ("Grand Rounds"), *Paiks*, and *Athprohoris* ("eight watch" men), very generally hold tenures of this nature. Orissa is especially rich in them. Even at the present day, it is said, obvious traces exist of the sub-division of the lands in Orissa into tracts held by military retainers and by *malguzari* tenants. The *Kiladars* and *Paiks* are the present representatives of the former class, and their tenures are even at the present time entered in the revenue accounts as *Khurda Ghirjat*, or petty forts. Formerly some of these tenures were held subject to various feudal services (*sheva*)—such as bearing the sword of state, carrying the king's shield, umbrella, or slippers (*e*). Village accountants and rent collectors, such as *Surburahkars*, *Kanungos*, *Putwaris*, *Halshanas*, and *Halmajhis* also held service lands in some places. *Nankar* was a common term used to express the lands held by village officers as well as those held by *zamindars* in lieu of wages. *Bayja* and *Dohali*

(*a*) *J. Erskine*, H C., 25th July, 1867. And this agrees with the ruling in *Chandrabali Debya*. Sutherland, P. C., 602. See S. D., 1860, 643; 1863, (Hay's Reports) 384.

(*b*) S. D., 1858, 1713; 1862, 284, 292.

(*c*) *Gunja Narain Sen*, H. C., 16th December, 1863.

(*d*) *Chakaran* is the plural of *Chakar*, a servant.

(*e*) Stirling's Orissa, Asiatic Researches, XV., 220, Brigge, 67.

Rakhi Rupit, *Muaafi*, *Jagir*, *Heta*, *Khanabari*, (Cuttack) (*a*), *Gram Surungami*, and *Jibka* are other names for the same. *Sarshikan* ("broken, head" tenure) was held by the families of officers killed in the public service, but this more properly belongs to the class of charitable and religious rent-free tenures (*b*).

By Section 41, Regulation VIII, 1793, all *chakaran* lands were annexed to the *malguzari* lands at the Decennial Settlement, and declared responsible for the revenue assessed upon the whole estate in which they were included, along with the other lands. It was explained at the same time that the object of this inclusion was not to increase the revenue, nor to preclude the continued appropriation of the land in lieu of wages, but merely to render the whole community equally responsible for its due payment (*c*). It is true that most of these lands paid nothing towards the revenue, but, as remarked by the Privy Council in the case of *Lilanand Singh* (*d*), it is a mistake to suppose that no lands were included in the settlement which did not pay rent, as much waste land was unquestionably so included.

There have been many suits to resume *chakaran* lands of late on the part of *zamindars*, especially since the case of *Jaikishen Mukherjya vs. Ahmad Baksh*, decided by the Privy Council in 1864 (*e*). In that case the *zamindar* sued to resume on the allegation that the lands were *gram seranjami* lands, held for the performance of services personal to the *zamindar*; that these services were no longer performed, and therefore that the lands were liable to resumption. Government resisted the claim, on

(*a*) II, S R., 5, *Note*.

(*b*) *Hukusaies* is a *mooktar's* service tenure. See S. D., 1854, 495. The *Kamias* or predial slaves of Behar, and the *Khawas* slaves (whence "chouse," according to Wilson) of Purneah, sometimes hold lands for their subsistence, which are thus a species of service tenure.

(*c*) R. B., 13th October, 1790. Harington, II, 235.

(*d*) Sutherland, P. C., 251

(*e*) Sutherland, P. C., 542.

the ground that the lands were *chokidari chakaran*, for the performance of Police services. The Privy Council held that the decision of the case must depend mainly, if not wholly, on the question, what was the tenure of the lands at the time of the Decennial Settlement? and finding that the lands were at that time subject to the performance of *chokidari* duties, as well as *zamindari*, they disallowed the claim. Thus, too, in a previous case, the Sudder Court observed that if the lands were originally held on the double condition of performing *chokidari* duties and *zamindari* duties, the mere cessation of the performance of the *zamindari* duties would give the *zamindar* no title to resume (*a*). In a suit to eject a *chokidar* and *athprohori* from his tenure, it was held that, if the lands were burdened with both duties previous to the Decennial Settlement, the landlord could not recover possession, but if the duties of *chokidar* had been added after the Settlement, the Government could not intervene to prevent the *zamindar* from resuming (*b*). Though *chakaran* lands were annexed to *malguzari* lands at the Settlement, yet the rent of these lands was not included in the assets of the estate, and if the *zamindar* wishes to appropriate this rent he must show that the services of the *chokidar* are no longer required (*c*). These cases fully establish the point that if lands have been held by a *chokidar* as a service tenure from before the time of the Decennial Settlement they cannot be resumed by the *zamindar*. And it is expressly provided by Clause 8, Section 5, Regulation IX, 1825, that *chakaran* lands of village or *zamindari* servants are not to be resumed without the sanction of Government. Section 9, Regulation XII, 1805, contains a similar provision regarding the "lands appropriated to the maintenance of *paiks* for the support of the Police in Cuttack." If these Sections stood by themselves, it would appear

(*a*) S. D., 1858, 1152.

(*b*) S. D., November, 1860, 315, 317. See *Muktakeshi Debya*, H. C., 4th September, 1865.

(*c*) S. D., April, 1860, 454. See S. D., 1854, 495.

that *zamindari chakaran* lands, as well as those held for Police services, could not be resumed without Government sanction. But the Sudder Court has decided that if the services, by performance of which the land is held, are purely *zamindari*, the *zamindar* may sue to assess the lands whenever he requires the services no longer, or when the tenant fails to perform them. When the service is dispensed with, long rent-free possession *(a)* gives title to exemption from assessment *(b)*. It is sometimes said that it is not necessary to sue to resume these tenures as a preliminary to suit for assessment or enhancement *(c)*. In other cases it is said that a service tenure cannot be assessed till it has been regularly resumed *(d)*. It has been held that a rent-paying service tenant can acquire a right of occupancy under Section 6, Act X *(e)*. But tenants who have pleaded a service tenure are not allowed afterwards to shift their title to one resting on long possession *(f)*. In one old case it was held that lands granted by a former *sulahdar* of Cuttack to a *khandait* or *sirdar* of *paiks*, which had been held at an invariable quit-rent for more than 12 years before the Decennial Settlement, were not subject to enhancement *(g)*. It does not appear that the service had been dispensed with in this instance. Government has such an interest in resisting a claim to assess service lands, as entitles it to be made a party to any suit instituted for that purpose *(h)*. In the two cases already cited from the Privy Council reports, it is laid down that *chakaran* lands are quite distinct from the *thanadari* lands mentioned in Clause 4, Section 8,

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(*a*) S. D., 1857, 786.

(*b*) *Chandernath Roy*, H. C., 31st March, 1864. *Lilanand Singh*, 6th June, 1866. *Kuldip Narain Singh*, 8th September, 1866, F. B.

(*c*) S. D., 1857, 786; *Madhab Jana*, H. C., 25th January, 1867.

(*d*) *Nilmani Singh Deo*, H C., 22nd May, 1863.

(*e*) *Jardine, Skinner & Co.*, H. C., 6th June, 1866.

(*f*) S. D., 1851, 261.

(*g*) III., S. R., 346.

(*h*) S D., July, 1860, 6.

Regulation I, 1793, and therefore the Government can have no title to resume them under that clause.

Zuripeshgi leases are very common in Behar. *Zuripeshgi* means an advance of money on the security of a farm. A low rent, called *Hukagiri*, is usually reserved to the lessor mortgagor, and the lessor's right of re-entry at the end of the term is contingent upon the repayment of the advance, either in money or by the usufruct of the land. Under a *Bhurna* lease, the whole rent is to be retained by the lessee until the entire interest and principal of the debt is liquidated. The conditions of the *Patowa* lease of Sarun are similar to those of *Bhurna* leases (*a*). Under the *Jad bandhaki ijara* of Bengal in like manner the rent of the farm is retained by the lessee in lieu of interest on the loan. *Bhog bandhaki* leases also occur. It is probable that these arrangements, whereby the usufruct of the land is to be enjoyed by the lessee mortgagee in lieu of interest, originated, like the "Welsh mortgages" of English law, in religious prejudices against taking interest (*b*). It is said in the English books that Equity looks at all arrangements whereby the rent of land is to be taken in lieu of interest with much suspicion, inasmuch as one party has a manifest advantage over the other, and the transaction is therefore tainted with "constructive fraud" (*c*).

Mr. Macpherson says of mortgage leases that they "have been decided to be on the same footing as pure usufructuary mortgages, and are dealt with as such; but this is only when there is a power of redemption, within a certain period, reserved to the lessor either expressly or impliedly. When a mortgage is given by way of lease, the loan is generally made repayable on the same day that the lease expires, and the lease usually

(*a*) Wilson gives this word as *Sadhowa*, but this seems a mistake. *Patowa* leases are not uncommon in Sarun, and the mortgage loan is said, "*pat jana*," to liquidate itself.

(*b*) See Williams, Real Property, 385.

(*c*) Smith's Equity, 290.

contains a condition that, if default is made, the lender lessee shall continue in possession on the terms of the lease until the debt is repaid from the profits of the land or otherwise. If, by the terms of the contract, the mortgagee is to look to the usufruct of the land for the payment of both principal and interest, the mortgagor is not personally liable for the payment of either, in the absence of a special agreement that he shall be so. The mortgagor has the right of redemption at any time on liquidation of the debt either from the usufruct, or by a cash payment or deposit in Court. The lessee never can become absolute owner of the mortgaged land which he has in possession, and the right of redemption remains to the mortgagor and his representatives after any lapse of time, however great (*a*)."

As to the lessor's right of re-entry, it has been held repeatedly that a mortgage tenant can never gain a right of occupancy by prescription (*b*). A lease granted in consideration of an advance or premium not to be repaid, does not of course amount to a mortgage lease. And the Western Court has ruled that leases for a consideration are not to be regarded as usufructuary mortgages, when they contain no condition for the continuance of the lessee in possession beyond the fixed term, in the event of the debt not being discharged, and therefore do not effectually secure the repayment of the debt by hypothecation of the land (*c*). In one case the lessee was declared liable to refund such surplus proceeds as had remained after realization of his principal and interest (*d*).

So far as these leases partake of the nature of common leases, it appears that suits regarding them lie under Act X (*e*), but they probably cannot be registered under Act XI, 1859. And

(*a*) Macpherson on Mortgages, 2nd *edit.*, p. 11.

(*b*) I, S. R., 187; S. D., 1855, 57.

(*c*) *Mansur Khan*, N. W. P., 17th March, 1864, *Hassain*. N. W. P., June 7th, 1863, F. B.

(*d*) IV., S. R., 251.

(*e*) *Bishwa Nup Dutt*, H. C., 30th June, 1864.

by Section 25, Act X, no application for the ejectment of a *ziraiatdar* at the end of his term will lie under that Act. Nor can these leases be cancelled by suit under Clause 5, Section 23, for non-payment of rent (*a*).

(*a*) *Muhammad Ali*, H. C., 30th March, 1863.

CHAPTER II.

CREATION OF TENANCY.

Having enumerated the various kinds of tenancies known to the law, we now proceed to the consideration of their incidents; and, in discussing these, the method adopted in Smith's "Law of Landlord and Tenant" will be followed, and the subject treated under four heads:—

First.—Those points which occur at the creation of tenancy.

Secondly.—Those which occur during the tenancy.

Thirdly.—Those which occur at the close or determination of the tenancy.

Fourthly.—As the parties to the tenancy are sometimes changed by the introduction which frequently takes place, either of a new landlord or of a new tenant, whether by assignment of the landlord's reversion, or by assignment of the tenant's term or otherwise, the points occurring upon a change, either of the landlord or of the tenant, will be considered (*a*).

In accordance with this arrangement, the points occurring at the creation of tenancy will be first mentioned, and these points are the following:—(1) who may be lessors; (2) who may be lessees; (3) what may be leased or demised; and (4) the mode of leasing.

Creation by act of law.—As has been already explained in Chapter I., "statutory tenancies" are created by the act of the law, and therefore the powers or titles of the landlords under whom such tenures originate are entirely immaterial. Thus, when the Regu-

(*a*) See Smith, 30.

lations of 1793 converted the dependent *talookdars* and the *ryots* into "tenants" of the *zamindars*, it created the several statutory tenures before enumerated tenures, the titles of which are good and valid, not only against the *zamindars* with whom the settlement was made, and their representative, but also against auction purchasers. The statutory tenancy is held by a title concurrent with the title of the *zamindar* to his estate, and is in no way whatever derived from his, as contract tenancies are. So, too, the prescriptive statutory tenancies under Act X are created by the *fiat* of the law, and are in no sense derived from, or created by, the incumbent of the *zamindari* for the time being. The title of the tenant to his tenure depends, not upon any lease which he may have received from the *zamindar*, but upon the express provisions of the law (*a*). When *pottahs* and *kabuliyats* are interchanged in tenancies of this nature, the transaction is not the creation of a new tenancy, but merely a mutual specification of the terms of a pre-existing tenancy. So, too, when Collectors grant *pottahs* under Section 9, Regulation VII, 1822, to *ryots* of this class, the *pottah* is simply evidence of the statutory tenancy, which existed before the *pottah* was granted (*b*). In all these cases the powers of the lessor are utterly immaterial. It is only when lessors grant *pottahs* to statutory tenants, which *pottahs* convey greater rights than such tenants are entitled to under the law, that the powers of the lessor have to be taken into consideration in determining the tenant's title. Thus, for instance, if a lessor grant a *pottah* to a *ryot*

(*a*) In the case of *Freeman* vs. *Fairlie* (1 Moore, 305), Lord Lyndhurst said:—"The *pottah* forms no part of the title; it is the conveyance that gives parties a right to claim the *pottah*." Hence, if a statutory tenant, whose tenure is created by act of law, takes a new *pottah*, that does not constitute a new commencement of his tenancy from which to count limitation. See *Ganga Gobind Mundul*, Sutherland, P. C., 679.

(*b*) The Board has expressly ruled, that settlement officers cannot create new rights, but merely record existing rights. Settlement Rules, Section VI, Clause 1.

possessing a right of occupancy under Act X, merely declaratory of his right to hold at fair and equitable rates, the title of the *ryot* is entirely unaffected by the nature of the lessor's interest; but if a lessor were to give such a *ryot* a *mukarrari pottah*, the *ryot's mukarrari* title would of course have been created by, and depend for its validity upon, the power and title of the lessor to grant such a *pottah*, just as ordinary contract tenancies depend for their validity upon the power of the lessor to create them. The dependent *taluks* resulting from the resumption and assessment by the Collector of *lakiraj* tenures under Section 9, Regulation XIX, 1793, are another class of statutory tenancies created by act of law, which do not depend for their validity upon the title of the *zamindar* in whose time they were created. But invalid rent-free grants, resumed and assessed by the Collector under Section 28, Act X, as they originated after 1793, are not statutory tenancies, and therefore any leases of such tenures must depend for their validity on the powers of the lessor to grant them (*a*).

I.—Who may be Lessors.

General Rule.—It is obvious that the ability of a person to grant a lease must, in the great majority of cases, depend on the extent of his own interest. A man cannot grant to another a greater estate, either in extent or duration, than he himself possesses (*b*). Thus, as under the general revenue system of the country, a *zamindar's* proprietary title to his estate subsists only so long as he continues to pay the revenue due from it, no *zamindar* can grant a lease which shall, *per se*, be binding upon an auction purchaser of his estate when sold for arrears of the revenue due from it (*c*). Section 2, Regulation XIV, 1812, and Act XVI, 1842, expressly

(*a*) The rules as to the assessment of these tenures are given in the Chapter on Resumption of rent-free grants.

(*b*) S. D., 1857, 703, Broom's Maxims, 317.

(*c*) Section 7, Regulation XLIV, 1793, &c.

provide that *zamindars* holding their estates under temporary settlements, such as that in Cuttack, cannot grant leases for a term extending beyond the terms of their own engagements with Government. Act XVI, however, provides that, if a lease extending beyond that term be granted, it shall not be altogether void, but shall hold good for the period of the *zamindar's* holding; and this seems a rule of general application.

And by Section 2, Regulation XVIII, 1812, "no person holding a restricted interest in an estate, whether for life or other limited period, or subject to control or restriction in the use or disposal of the property, are competent to grant leases for periods exceeding the term of their own interest in the property or exceeding their power over it." These enactments have been illustrated by a great number of decisions which are collected below.

Zamindars.—By Section 52, Regulation VIII, 1793, *zamindars* are empowered "to let the remaining lands of their *zamindaris* (*i. e.*, those not covered by dependent *taluks*) under the prescribed restrictions in whatever manner they may think proper." Regulations V and XVIII, 1812, empower *zamindars* under the Permanent Settlement to grant leases, such as *mukarraris* and *putnees*, in perpetuity, though such leases, if granted after 1793, convey no title after the grantor's title has been extinguished by a sale for arrears of revenue (*a*). But, in the case of leases granted by *zamindars*, an exception has recently been made to the rule that the lessor cannot create a greater estate than he himself possesses, as *taluks* and farms created since 1793, which have been registered under Act XI, 1859, will now hold good against auction purchasers (*b*), *zamindars* who have mortgaged their estates, and against whom a foreclosure decree has been passed, cannot grant a lease which shall be binding upon the mortgagee (*c*). And, as the mortgagee's

(*a*) Section 2, Regulation VIII, 1819, S D., 1852, 958, 961, &c.

(*b*) See Chapter V under "Cancelment by Auction Sale."

(*c*) *Hunuman Dass*, H. C., 9th September, 1862.—See S. D, 1858, 656.

estate is one of a "limited and restricted" character, all leases granted by him before foreclosure are subject to the mortgagor's equity of redemption (*a*). Leases granted by *zamindars* during the time that their estates are attached by the Civil or Revenue Courts, are invalid against every one but the grantor, in the event of his being restored to possession (*b*). And leases granted by expectant *zamindars*, in anticipation of the settlement of an estate being made with them, but before they have obtained possession, are of course void against everyone but the lessor, in the event of his obtaining possession (*c*). These leases resemble the "leases by estoppel" mentioned in the English books (*d*), of which it was quaintly said, that "a man might have a lawful freehold from one who had nothing in the land, just as one may have fire from a flint which has no fire in it" (*e*). The Western Court has held that the mere application for the attachment of an estate does not vitiate a *bonâ fide* lease granted by the judgment-debtor on the day before the receipt by the Collector of the order for attachment (*f*). But the Calcutta Court has held that leases made at any time, *pendente lite*, are invalid against a decree-holder (*g*).

Sharers in joint estates (*h*). Sections 23 to 25, Regulation VIII,

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(*a*) Archbold, 12.

(*b*) I. S. R., 172, 195; V. S. R., 240; S. D., 1849, 385; III, Knapp, P. C., 27, note, &c.

(*c*) S. D., 1850, 562.

(*d*) Williams—Real Property,—358. By Hindoo law, possession of the subject is not necessary to give validity to a contract concerning it. II, S. R., 23.

(*e*) Smith, 32, note.

(*f*) XI, N. W. P., 12, 14.

(*g*) S. D., 1859, 1223; See Constr., 1059.

(*h*) *Ijmali* or joint estates are of several kinds: (1) The joint undivided estate held in common tenancy when all the sharers have a common right and interest in the whole of the estate, without any separate title to distinct lands forming part of the estate. Section 30, Regulation XIV, 1819. (2) Perfect or *mukmil puttidari*, in which, though held under joint responsibility as regards

1793, provided that all sharers in joint undivided estates should appoint a manager to grant leases and conduct the general business of the estate, as is the practice in the North-West at the present time. But, unfortunately, this was done away with by Regulation XVII, 1805. A proposal was made in 1833 to re-enact this provision, as far as regarded joint undivided estates held in common tenancy throughout, but from some cause the proposition was negatived by Government (*a*). The question as to the power of single sharers in a joint estate to grant leases has been much discussed, and the decisions regarding it have been sometimes conflicting. It is a practice very common in the Lower Provinces for each sharer to manage for himself, by collecting from every *ryot* his own share of the rents, and by granting separate leases to *ryots*, so that a *ryot* may have to pay his rent in minute portions to several landlords; and two or more *ryots* may sometimes each hold a lease from different sharers for the same field (*b*). In regard to this practice, sometimes it is said that a sharer in a joint undivided estate is incompetent to grant a lease of any portion of it without the assent of his co-sharers (*c*). On the other hand, there are decisions to the effect that such a sharer is competent to make a valid lease of his own share (*d*). And when one sharer is recognised as the manager, he can, of course, make a lease of, or convey, the entire estate (*e*). The practice is to recognise as

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the revenue, the lands are divided, and each portion held in severalty by some one or more of the joint proprietors. (3) Imperfect or *namukmil puttidari* in which part of the land is held in common, and part in severalty, by the various proprietors. N. W. P. Circular, 24th June, 1842. Estates of this kind are found in Behar.

(*a*) Peters, 305.

(*b*) See Peters, 305.

(*c*) II, S. R., 230; S. D., 1848, 328, 1859, 1575, *Ganesh Ram Singh*, H. C., 5th December, 1865.

(*d*) *Sukhan Suhai*, H. C., 7th June, 1866.

(*e*) I, S. R., 45.

valid leases of his own share made by a sharer in an estate which has been privately partitioned; for it is said that a private partition constitutes a legal severalty for all purposes under the Hindu law (*a*). When a *mukarrari pottah* of an estate was granted by one sharer nominally acting as agent for the whole body, but in reality without their authority or knowledge, it was held invalid (*b*). The powers of one sharer to grant a lease on the part of all, depend upon the question whether he has been authorised to act as their agent, and the cases as to this are collected below under the head of "Agents" (*c*).

Infants.—This term includes all proprietors of revenue-paying estates who have not completed their eighteenth year, as provided by Regulation XXVI, 1793, and others who have not completed the age of fifteen (*d*). By Hindu law, an infant cannot execute a lease, or enter into any other engagement, and a claim founded thereon will not lie against him or his surety, the transaction being void *ab initio* (*e*). In English law, the rule seems to be, that leases granted by an infant are not absolutely void, but only voidable at the option of the lessor on attaining his majority (*f*).

Hindu widows.—Under the Hindu law, a widow, though she takes as heir to her husband, takes only a special and qualified estate. If there be collateral heirs of her husband, she cannot, without their assent, alienate the property, except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband,

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(*a*) VI, S. R., 273.

(*b*) I. S. R., 238.

(*c*). Where a Hindu family live joint in food, the presumption of law is, that all the property they are in possession of is joint, until it is proved otherwise. *Dhurm Dass Pandy*, Sutherland, P. C., 147 Separation in mess is not conclusive proof of separate property. *Bani Madhub*, II. C., 31st July, 1867.

(*d*) S. D., 1853, 505; 1856, 262; or Sixteen V. S. R., 114.

(*e*) IV, S. R., 339.

(*f*) Smith, 48.

she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must prove necessity. The restrictions on her power of alienation are inseparable from her estate, and the absence of heirs, capable of taking on her death, does not confer on her greater powers of alienation. The *onus* is, on those who claim under an alienation by a Hindu widow, to show that the transaction was within the scope of her limited powers (*a*). Hence Hindu widows are ordinarily incompetent to grant leases which shall be binding on the reversioners without their consent having been obtained (*b*). But, according to the rule laid down in Act XVI, 1842, leases granted by such a widow for any length of time will hold good for the period of her own lifetime (*c*). It is not open to the reversioner to sue to oust the widow from possession, or to have the lease set aside during the widow's lifetime, but he must wait till her death (*d*). The grant of a lease beyond a widow's power is not an act of "waste" likely to injure the reversioner, for the law is, that no possession, acquired by grant from a Hindu widow, can be adverse to the reversioner till his right to possession accrues (*e*). Limitation runs against the successor of a grantor possessing only a limited estate from the date of his succession (*f*).

Trustees of endowments.—In the *Hedaya* (Hamilton's Translation, p. 334) it is said, that the sale or transfer of *wukf*, or property appropriated to religious or charitable purposes, is unlawful, according to all lawyers, because of a saying of the

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(*a*) *Collector of Masulipatam*, Sutherland, P. C., 476; see Morley's Digest, I, 1286.

(*b*) S. D., 1854, 274; Moore, VI, 433, see *Rajuni Kant Mitter*, H. C., 31st December, 1862; *Jadubindo Adhikari*, 23rd February, 1863.

(*c*) *Mohun Kunwar*, H. C., 30th October, 1862.

(*d*) *Lall Sunder Dass*, H. C., 26th August, 1862, S. D., 1859, 291, overruling the case of *Nundlall* v. *Bulaki Beebee*, S. D., 1854, 351.

(*e*) See VI, Moore, 433.

(*f*) S D, 1851, 120.

prophet:—"Bestow the actual land itself in such a manner that it shall be no longer saleable or inheritable" (*a*). Accordingly it has been held that, if property be wholly *wukf*, that is, if all the profits be devoted under the terms of the endowment exclusively to religious or charitable purposes, the *mutawali*, or superintendent of the endowment, having only a life interest, is incompetent to grant leases for a longer period than the term of his own life (*b*). And the same rule holds good with regard to a *shevait*, or superintendent of a Hindu religious establishment or endowment (*c*). But if the office be hereditary, and the holder, whether *mutawali*, *shevait*, or *mohunt*, have a beneficial interest in the property, it has been held that the property must be considered as a heritable estate burdened with certain trusts, the proprietary right in which is vested in the tenant and his heirs; and that, in such case, he is as competent as other *zamindars* to grant leases even in perpetuity (*d*). Thus, also, as a *devuttur* estate is simply an estate burdened with a trust for the worship of an idol, not with a trust for the benefit of the family of the grantor, the *lakhirajdar* is competent to make leases even in perpetuity (*e*). And it may be added that under Muhammadan law all property devoted to religious purposes is not necessarily *wukf* (*f*).

Farmers.—By Section 59, Regulation VIII, 1793, no farmer, without permission of his landlord, shall grant a lease extending beyond the term of his own lease. Hence an *ijaradar* cannot, of his own authority, create a tenant right (*g*). *Pottahs* granted

(*a*) *Jeewan Dass Saha*, Sutherland, P. C., 100.

(*b*) S. D., 1858, 586; VII, S. R., 268.

(*c*) IV, S. R., 151.

(*d*) S. D., 1855, 323; 1856, 304; 1858, 586; see *Ali*, H. C., March 15th, 1866.

(*e*) S. D., 1849, 65; *Jadubindu Adhikari*, H. C., 23rd February, 1863.

(*f*) Macnaghten's Principles, 337.

(*g*) S. D., 1852, 958. But a tenant right may be created by operation of law out of a holding under a farmer.

by a farmer's *gomashta* give no title whatever beyond the period of the termination of the farm (*a*).

Holders of service tenures.—Holders of conditional tenures, enjoyed in lieu of wages for service, are incompetent to grant leases to hold good after their death (*b*). In a suit instituted in 1859, it was held that a perpetual sub-lease, granted by a *ghatwal* in good faith, would hold good, not only during the lifetime of the grantor, but also after his decease during the tenancy of his heirs and successors (*c*). But this rule appears to have been modified by Act V, 1859, which provides that *ghatwals* in Beerbhoom shall have the same power of granting leases for any period as is allowed by law to proprietors, "provided that no lease of *ghatwali* lands for any period extending beyond the lifetime or incumbency of the grantor, shall be valid and binding on the successors of the grantor, unless the same shall be granted for the working of mines, or for the clearing of jungle, or for the erection of dwelling-houses or manufactories, or for tanks, canals, and similar works, and shall be approved by the Commissioner of the Division, such approval being certified by an endorsement on the lease under the signature of the Commissioner." Tenants, who have held for a great length of time on a lease given by a *ghatwal* in excess of his power, cannot, however, be summarily dispossessed (*d*).

Managers of attached estates.—The power of managers to grant leases is of an exceptional character. Having no interest in the estate themselves, they can only make leases of it when expressly empowered by law to do so. By Section 16, Regulation X, 1793, managers of estates, in charge of the Court of Wards, are empowered to manage the estates under their

(*a*) S D, 1853, 53; see S. D., 1859, 1044.

(*b*) S D., 1846, 215.

(*c*) *Deputy Commissioner of Beerbhoom*, H. C., 27th August, 1862.

(*d*) See case last quoted.

care for the proprietor's benefit, in like manner as if they belonged to themselves, provided that they shall not grant any lease "extending beyond the life of the proprietor." But now by Regulation VI, 1822, the Court of Wards cannot grant leases for a longer term than ten years. Managers of minors' estates, committed to the charge of the Collector by the Civil Court under Act XL, 1858, by Section 12 of that Act have the same powers as managers under the Court of Wards, and Section 2. Act XXXV of 1858, prescribes the same rule for managers of lunatics' estates placed in charge of the Collector under that Act. By Section 2, Act V, 1859, whenever *ghatwali* tenures come under the management of Government officers, the Court of Wards, or the Commissioner, may grant leases in perpetuity, for the purposes specified in that Act. When estates are attached by the Civil Courts, in cases of disputed succession under Section 5, Regulation V, 1799, or in cases of disputes among the shareholders under Section 26, Regulation V, 1812, they are placed in charge of the Collector, and a manager is appointed under Section 3, Regulation V, 1827. By Section 26, Regulation V, 1812, the Collector's duty is "to collect the rents and discharge the revenue, and provide for the cultivation and future improvement of the estate," and it has been held that these words convey a power of leasing (*a*). Though a Collector cannot directly farm the property in this case (*b*), yet any lease granted by the manager, under the Collector's direction, would be a valid engagement. The lease should ordinarily be for a period of ten years, with a condition for cancelment if the attachment be withdrawn sooner (*c*). A manager of an attached estate, under Regulation V, 1827, is competent to grant leases, and a farmer holding under a lease from him has the same power (*d*). But in a recent case,

(*a*) VII., S. R., 277.

(*b*) R. B., March 19th, 1850; March 11th, 1851, Rules, Chapter XXV, Section VI.

(*c*) *See* S. D., 1859, 1575.

(*d*) S. D., 1846, 305.

overlooking this chain of precedents, it was said that a manager of an attached estate cannot create the relation of landlord and tenant (*a*). Estates attached by the Magistrate under Sections 184 and 249 of the Criminal Procedure Code, according to the Board, should be treated under the provisions of Regulation V, 1827, from which it would seem that they may be leased by the manager (*b*). But it was ruled by the Sudder Court that estates attached by order of the Criminal Courts cannot be farmed (*c*).

Guardians.—The power of a guardian of an infant heir to charge an estate not his own is under Hindù law a strictly limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate, and the charge must be one that a prudent owner would incur to benefit the estate (*d*). Leases granted by private guardians can ordinarily be set aside at the option of the minor when he attains his majority; and the minor will not be held to have divested himself of the power to exercise this option, unless it can be shown that he has consented to the lease after attaining his majority (*e*). But this option can, of course, only be exercised while the property remains in his possession. If it has been transferred, he is incompetent to ratify obligations concerning it (*f*). When he has once ratified a lease, neither he nor any one claiming under him can set it aside (*g*). And infants wishing to exercise the option of cancelling leases granted by their guardians, must sue the guardian and the lessee for that purpose, as such leases cannot be set aside summarily (*h*).

Administrators.—By Section 18, Act XL, 1858, persons who

(*a*) *Srigopal Pal Chowdhry*, H. C., 20th November, 1865.
(*b*) New Rules, Chapter XXV, Section VI.
(*c*) S D., 39, 11th June, 1850.
(*d*) II, Moore, 241.
(*e*) S. D., September, 1860, 227.
(*f*) S D., 1856, 312; *See* S. D., 1853, 525.
(*g*) *Chunder Kant Mukherjya*, H. C, 30th March, 1864.
(*h*) *Srinath Rai*, H. C., 22nd August, 1862.

have received certificates of administration of minors' estates under that Act, shall not grant leases of the estate for a period exceeding five years without an order of the Civil Court previously obtained. And Section 14, Act XXV, 1858, prescribes a like rule for administrators of lunatics' estate under that Act. But probably neither can grant mortgage leases.

Agents.—By Section 59, Regulation VIII, 1793, no agent can grant a *pottah* without authority from the proprietor, or dependent *talukdar*, or the manager of disqualified proprietors, for whom he acts. Agents are competent to grant leases on behalf of their principals, provided they have authority, express or implied, to do so (*a*). But whether an agent had implied authority to grant a particular lease, is sometimes a difficult question. Such authority may be proved by showing that it may reasonably be inferred from the circumstances of the case; and if the principal has, either by words or by his conduct, represented a person as his agent publicly or to the lessee, and the lessee has taken a lease from that person on the faith of that representation, the principal is *estopped* from afterwards denying the truth of his representation, which, thus by virtue of the doctrine of *estopped*, becomes equivalent to a real authority given by the principal to the agent (*b*). Assuming that an agency of some kind does in any given case exist, an important difference is to be noted between a "general" and a "particular" agency, the first being a large authority to do all acts connected with a particular business or estate, while the second is an express limited authority to do some particular act. If a "particular" agent exceed his authority, the principal is not bound by what he does; but if a "general" agent exceed his authority, the principal is bound, provided what he does is within the usual and ordinary scope of the business he is deputed to transact (*c*).

(*a*) S. D., 1851, 774.

(*b*) See Broom's Commentaries, 520.

(*c*) Broom, 517.

Applying these principles to the case of leases granted by agents, it has been held that the local agents of absentee *zamindars* must be considered to be "general agents" for their employers, that there is a delegation to them to do all acts connected with the management of the property of which they are the agents; that the principal is bound by the acts of such an agent done within the ordinary scope of his business, and that if the agent's general authority be limited by private instructions, prohibiting the exercise of it under particular circumstances, these private instructions being unknown to the lessee, cannot defeat the agent's acts; hence the absence of the power of a *Naib* to grant an ordinary *pottah* must be proved by the party denying it (*a*). But leases granted by such agents will not be upheld if it was obviously beyond the scope of their authority to grant them. Probably, for instance, no *Naib* would be held empowered to grant a *putnee* unless express authority were shown. When a Collector, in 1794, granted a *mukarrari pottah* without authority, it was set aside (*b*). But if his acts had been subsequently ratified by Government, the *pottah* would have been valid, for every ratification relates back, and is equivalent to a prior authority (*c*). Of course, if a public servant, acting within the scope of his authority, grants a lease on behalf of Government, it is binding upon his successors in office (*d*).

With regard to "particular agents," such, for instance, as mere receivers of rent, they have ordinarily no power to grant leases, and leases granted by them without express authority, are not binding on their principals (*e*). When a principal repudiates

(*a*) Hay's Reports, 1862, p. 3, S. D., 1858, 1547; as to the proof of the power of a *Gomashta* to grant leases, see *G. Muir*, H. C., 26th July, 1866. In Section 69, Act X, *naibs* and *gomashtas* are assumed to have the power of principals.

(*b*) *Ram Chunder Dutt*, H. C., 4th May, 1864; S. D., 1855, 357.

(*c*) IV, N. W. P., 1. See Broom's Maxims, 775.

(*d*) S. D., August, 1860.

(*e*) S. D., 1850, 62.

a lease granted by an agent, the point for enquiry is whether the agent was empowered generally to grant leases, and if not, whether, in the particular instance, the grant of the lease has been authorised or ratified by the principal (*a*).

II.—Who may be lessees.

Infants.—Under English law any person is capable of taking a lease, so far as the mere vesting of the estate is concerned; but with regard to any liability for the rent, or upon the conditions of the lease, a lessee, under disablility of age, is in the same situation as in the case of any other contract. And hence an infant lessee, if he elect within a reasonable time, after attaining his majority, to disagree to a lease granted to him during his minority, will not be liable for the rent (*b*). And from a case already cited, it would seem that the law in this country is the same; but on the other hand it has been said that the laws relating to the tenure of land here are so unbending that minority is no excuse for violating them (*c*).

Europeans.—By Regulation XXXVIII, 1793, all leases granted to Europeans without the sanction of Government, were invalid, but this restriction has been removed by Act IV, 1837, and Europeans holding land at the present time are just in the same position in regard to the rules as to the tenure of land, and to amenability to the jurisdiction of the Revenue Courts, as the natives of the country (*d*).

Public servants.—By Regulation VII, 1823, and Government Orders of 1835 and 1860, Covenanted Officers may not hold lands on lease or otherwise. By the Board's rules for Executive Officers, Section II, Uncovenanted Deputy Collectors may not take farms of estates in the districts in which they are employed. And

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(*a*) *Matadin Singh*, N. W. P., December 8th, 1862.

(*b*) Smith, 53.

(*c*) S. D., 1853, 301.

(*d*) *See* Act III, 1839.

by the same rules, Section IV, native ministerial officers may not take farms or *mukarrari* leases in the districts to which they are attached. A lease to a Collector's *Diwan*, in contravention of Section 15, Regulation II, 1793, was set aside (*a*).

Co-sharers.—It is competent to two or more sharers to take a lease jointly. But if co-sharers taking land jointly wish their several rights to be respected, all their names must be entered in the *pottah* or in the landlord's *sherista*. If some of them choose to keep in the background, and to take leases in the name of a co-sharer, their contract is solely with their co-sharer, and not with the *zamindar*, who is not bound to look beyond his own *sherista* (*b*). When the sharers acquired a *taluk* in separate shares, but such shares were not recorded in the *zamindari sherista*, they were held individually and collectively responsible for all the rent (*c*). When the unregistered co-sharers of a defaulting *putneedar* paid up their quotas of the arrear, this was held not to bar the *zamindar* from selling the tenure, as the unregistered sharers had no contract with him, and he was entitled to hold the tenant, named in the lease, responsible for the whole (*d*). In another case it was said that when distinct shares are not specified in the *pottah*, the tenure must be treated as a joint one, and liable to sale for the default of one sharer, as the tenure itself is that to which a *zamindar* has to look for the realisation of his rent (*e*). One sharer, when duly authorised, may take a lease which shall be binding upon the whole body, yet, when the lease is for a long period, and at a high rent, the signatures of all should be taken on the *kabuliyat*. When no reason is assigned for the omission of the

(*a*) IV, S. R., 130.
(*b*) S. D., 1857, 492.
(*c*) S. D, 1855, 207.
(*d*) IV, S. R, 295.
(*e*) S. D, 1859, 472, *See Telak Chunder Chuckerbutty*, H. C., March 31, 1863.

signatures of the whole body, very clear evidence of the authority of the single sharer to take a lease on their behalf will be required (*a*).

Farzis (*b*).—The general rule is, that a lessee who takes a lease in the name of another, can claim no rights against the lessor, whatever rights he may have against the ostensible tenant or *farzi*. When a landlord has granted a lease to an ostensible farmer, the person really interested in the farm, who has kept himself in the background, cannot afterwards step forward and compel the landlord to recognise him as the lessee (*c*). The surety of a fictitious lessee cannot sue the landlord for damages on account of the cancelment of the lease, on the ground that he was the real lessee (*d*). On the other hand, the lessor may ordinarily enforce the contract against the *benami* principal on discovering him. The rule has been thus laid down. When an agent takes a lease in his own name as principal, without disclosing the fact that he is acting merely as an agent, the principal, when discovered, is liable to be sued upon the lease; but the principal is not liable to be sued if the lessor, having full knowledge of the facts, and having the power and the means of deciding to whom he will give credit, elects to give credit to the agent in his individual character (*e*). If the agent can prove that the lessor knew he was acting as an agent when he took the lease, he may claim to be discharged from liability under the lease, for in that case there is no privity of contract between himself and the lessor (*f*). When the husband was sued on a *Kabu-*

(*a*) S. D., 1845, 319.

(*b*) *Farzi* means "by way of supposition," "fictitious," and is the name applied to ostensible parties to contracts when the real principals keep in the background.

(*c*) *Collector of Midnapore*, H. C., 11th August, 1862.

(*d*) III, S. R., 85; but see S. D., 1857, 1859, and Moore, IV, 333.

(*e*) *Hiralall Bakshi*, H. C., 11th November, 1862.

(*f*) See Broom's Commentaries, 321, 529.

liyat executed by the wife, it was held that it must be proved that the husband was the real principal, and had held possession on his own account (*a*).

III.—What may be leased.

It is obvious that leases might be made of the profits and fees of offices, such as those held by *Putwaris* and *Kazis*, but leases of this sort of property do not constitute the relation of landlord and tenant in the ordinary sense of the term. The rules of the rent laws apply only to leases of land either *khiraji* or *lakhiraj*, and of rights of pasturage (*ghasskur*), forest rights (*bankur*), fisheries (*julkur*), and the like. The rulings on this point will find their appropriate place in Chapter III, under the head "For what demands suit will lie," as it is in connection with questions of jurisdiction that the subject is ordinarily brought to notice.

IV.—Mode of leasing.

Under this head will be detailed the rules as to written leases and verbal grants of tenancies; as to the formalities required to give validity to written leases in certain cases, *viz.*, the rules as to stamps and registration, and the rules as to rent and *abwabs*.

Form of leases.—By Section 58, Regulation VIII, 1793, *zamindars* were required to prepare a form of *pottah* agreeably to the rules therein laid down, and, after obtaining the Collector's approval, to register a copy of it in the Civil Court; and by Section 65, no *pottahs* in any other form than this were to be executed. Regulation IV, 1794, enacted further provisions to the same effect. But Section 3, Regulation V, 1812, rescinded these rules, and enacted that "the proprietors of land should thenceforward be considered competent to grant leases to their dependent *talukdars*, under-farmers, and *ryots*, and to receive correspondent engagements for the payment of rent

(*a*) S. D., January, 1860.

from each of those classes, or any other classes of tenants, according to such form as the contracting parties might deem most convenient and most conducive to their respective interests." Consequently the form of *pottahs* is now altogether immaterial. A *hukumnama* has been held sufficient to create a tenancy from year to year (*a*). A tenant holding under an *amalnama* reserving a yearly rent, was considered to hold a tenancy from year to year, terminable at the close of any year (*b*). An *amaldustak* mentioning a *mukarrari* tenure, when followed by possession and payment of rent at the rate specified, has been held sufficient to create a *mukarrari* tenure (*c*). But it seems that words of inheritance would ordinarily be necessary to convey such a tenure in perpetuity. In a recent case it was said that an *amaldustak*, given in anticipation of a lease, is not equivalent to a lease, and confers no title, which seems rather doubtful (*d*). A *Sadrat Patra* (which is properly a grant under the authority of Government) has been held sufficient to convey a *mukarrari* tenure (*e*). Accidental misnomers in a lease, such as an error in describing the lessor's title, do not vitiate a lease (*f*).

As in the case of *pottahs*, so too in the case of *kabuliyats*, no particular form is requisite. Any document which can be construed as an engagement on the part of the tenant to pay rent operates as a *kabuliyat*. A mere bond has been held sufficient (*g*). A *Sarkhatnama*, (properly a written agreement or receipt) when it appeared by its terms to be a joint engagement entered into by several *ryots* together for the pay-

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(*a*) S. D., 1858, 1547.
(*b*) *Lamb's* case, S. D., 1858, 1880.
(*c*) S D., 1859, 1572
(*d*) *Khadim Hosain Khan*, H. C., 3rd December, 1864.
(*e*) S. D., 1857, 1819.
(*f*) S. D , 1850, 450.
(*g*) *Dhanpat Singh*, H. C., 14th May, 1867.

ment of rent, was held to be a valid *kabuliyat* (*a*). But a *tirij* or abstract rent-roll prepared by a Collector at the time of settlement, and not signed by the *ryots*, will not operate as a *kabuliyat* (*b*).

The only rules now in force as to the form of *pottahs* are that "every engagement contracted with under-farmers shall be specific as to the amount and conditions of it" (*c*); "that the rents to be paid by the *ryots*, by whatever rule or custom they may be regulated, shall be specifically stated in the *pottahs*, which, in every possible case, shall contain the exact sum to be paid by them" (*d*); and that "in cases where the rate only can be specified (as in *Bhaoli* tenancies), the rate and terms of payment, and proportion of the crop to be delivered, with every condition shall be clearly specified" (*e*). These rules are, so far as regards *ryots*, re-enacted in Section 2, Act X. Lastly, by Section 64, Regulation VIII, 1793, landlords are to "adjust the instalments of the rents receivable by them from their under-renters and *ryots* according to the time of reaping and selling the produce, and they shall be liable to be sued for damages for not conforming to this rule."

Term of leases.—By Section 2, Regulation XLIV, 1793, landlords were prohibited from granting leases for terms exceeding ten years. The reasons for this prohibition were similar to those which led to the passing of the English statute *Quia Emptores* in the reign of Edward I. to check the practice of sub-infeudation, namely, that the practice of granting sub-tenures for long terms tended to nullify the security possessed by the Government for the discharge of the liabilities incident to the superior tenures. But it was pointed out by Mr. Cole-

(*a*) S. D., 1859, 721.
(*b*) S D., 1858, 1434.
(*c*) Section 52, Regulation VIII, 1793.
(*d*) Clause 1, Section 57, Regulation VIII, 1793.
(*e*) Clause 2, Section 57, Regulation VIII, 1793.

brooke that this additional security was not necessary, as these leases could in no case hold good after a sale of the grantor's estate for arrears of revenue (*a*), and the restriction was consequently repealed by Section 2, Regulation V, 1812, which further declared proprietors of lands competent to grant leases "for any period which they might deem most convenient to themselves and their tenants, and most conducive to the improvement of their estates." Doubts having arisen on the construction of this Section, Section 2, Regulation XVIII, 1812, declared proprietors competent to grant leases "for any period, even to perpetuity, and at any rent which they might deem conducive to their interests." And Section 2, Regulation VIII, 1819, declared valid all leases in perpetuity which had been granted while the restriction was in force, with the proviso, however, that such leases should not on that account be held exempt from liability to cancelment, on the superior estate being sold for arrears of Government revenue.

Various kinds of leases.—The common name for a lease is *pottah*, and for a counterpart of a lease *kabuliyat*, which signifies properly the tenant's assent to pay the amount assessed on his land. *Daul* (from the Arabic *Daul*, condition, state, valuation) or *Daul bundobust* means a statement of the gross rental of an estate, and *Daulnama* or *Daulpatta* is sometimes used of an extract from this document given to individual tenants as a lease. *Kaul* (also Arabic, meaning a word, a promise) is sometimes applied to the document granted to specify a tenant's holding. *Istimrari pottah* is a lease in perpetuity at a fixed rent (*b*). *Mykarrari pottah* is a lease at a fixed rent. The mere description of a tenancy as *maurusi* (hereditary) does

(*a*) Harington, III, 479, note. For cases under Regulation XLIV, see *Rani Surnamoye*, P. C., 23rd July, 1864. I S. R., 172; II S. R., 19; IV S., R., 193, and Harington, III, 473.

(*b*) See H. C., 6th February, 1866.

not give the right of holding at a fixed rent (*a*). *Bilmukta*, (literally "according to agreement") means that the rent is fixed for the full term of the lease, free of enhancement. In the Benares Regulations the word is used of the specific and definite rents arrived at by consolidating the cesses with the rent (*b*). In order to make a lease hereditary, the *pottah* must contain words of inheritance, such as *naslan ba naslan*, "in lineal descent;" *butnan bad butnan*, "generation after generation;" *ba farzandan* or *ba aulad*, "along with heirs;" *pusht ba pusht*, "generation after generation;" *putra putradi*, "sons and grandsons" (*c*). All these words strictly apply only to heirs in the direct line of descent; but they are taken to include heirs and descendants generally. In a recent case it was ruled by the Privy Council that the objection that the defendants' *pottahs* contained no "words of inheritance," was one not open to the plaintiff in a suit for enhancement, where the pleadings admitted the existence of the tenure and the lawful occupation of the defendants (*d*.) *Miâdadi* means a lease for a specified term, and *be miâadi* one that does not specify its own duration. *Thika* means properly a lease at a specified and certain rent. *Sharh i mauza* and *sharh i pargana* mean *pottahs* at the village or *pergunnah* rates (*e*). *Mushakkas* is another name for an adjusted and specific rent. The word properly means "stipulated." *Tashkis* (from the same root) is sometimes used of an adjusted rent excluding cesses, but according to Wilson it signifies rent at the current rates of the district. *Benap ka pottah* is a lease under which the lands are not to be measured during the

(*a*) See *Sukhimani Haldar*, H. C., 25th July, 1864. *Lagâni* is a Mymensingh term for a fixed rent.

(*b*) See Section 2, Regulation LI, 1795, and Peters, 327. III Harington, 353.

(*c*) S. D., 1853, 648; May 1860, 577; V Moore, 473 In some old cases *mukarrari* leases seem to have been presumed to be hereditary, III S. R., 332.

(*d*) *Gopal Lall Thakur*, Sutherland, P. C., 558.

(*e*) See deposition of the *Rae Raian*, III Harington, 353.

holding. *Beraji ka pottah* is a lease under which rent is to be paid according to measurement of the crop. It is met with in Purnea. *Ekdarra ka pottah* is a lease under which the same rate is paid for each *bigha* of land, whatever the crop. *Ekana ka pottah* is another Purnea lease under which rent is paid at one average rate per *bigha*. Under a *jot jaribi ka pottah*, the tenant only pays rent for so much land as he is found by measurement to cultivate. *Hadmahadad* is a term in leases signifying that the lessee has title to all the lands mentioned in his lease. *Dadai* means "grants." *Asmani firmani* is a term to express damages occurring by the act of God, such as from droughts or floods. *Pattan karan* and *Billi karan* are common Bengali expressions for granting a lease.

Construction of leases.—A lease for the *darobust hukuk*, or entire rights of a village, was held to include the jungle lands, though they were not specified (*a*). But sometimes the *bankar* or forest rights and the soil belong to distinct owners (*b*). The *loha mehal* in Beerbhoom is separate from the property in the soil (*c*). A grant of the *asli* village in Behar generally passes the right to the *dakhili* or subordinate villages as well (*d*). A lease running:—"You shall continue to pay Sicca Rupees 5, the sum fixed on the whole as *thika jama* of the said *mauzah*, every year, and having cleared the village of jungle, and having brought the lands under cultivation yourself and through others as usual, enjoy and occupy the same with your son and grandson in succession," &c., conveys an absolute heritable and transferable interest (*e*). Leases which do not specify the period of their duration, do not fix the rent

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(*a*) S. D., 1853, 242.

(*b*) H. S. R., 105. So also *Phulkur*, N. W. P., 1852, 549.

(*c*) I. S R., 337.

(*d*) S. D., 1855, 266.

(*e*) *Bissumber Pal*, H. C., 4th March, 1863.

for ever (*a*). Where a lease for a fixed term of 7 years contained no words to import the continuance of the interest after the death of the grantee, nor any expressions which pointed to any earlier determination of the interest, the Privy Council held that the *primâ facie* meaning of the lease was that it should continue for the full term for the benefit of heirs, even though the original lessee did not live out the term (*b*). The subject of agreements and conditions in leases will be discussed in Chapter V under the head of "Breach of Conditions," as it is in connection with suits for ejectment on account of breach of conditions of leases that it has generally to be considered.

Delivery of lease.—The interchange (*takabbaz ul badlain*) of the lease and its counterpart between the parties, coupled with entry on the lands by the tenant, constitute the commencement of the tenancy. Previous to such entry, the tenant possesses only what is called in English law an *Interesse termini*, or right of entry (*c*); and this right, if disputed by the landlord, can be enforced only in the Civil Court (*d*). Formal delivery of the lease is not essential. When, however, a lease was executed and deposited in the hands of a third party as an *escrow*, with the understanding that it was not to be delivered to the lessee till he had performed certain conditions, and the third party delivered the lease to the lessee without further authority from the lessor, and before performance of the conditions, the lease was held invalid (*e*).

Stamps on leases.—The stamps required for leases and their counterparts are specified in Schedule A, Act X, 1862. Leases reserving no rent, made in consideration of a money payment,

(*a*) *Mothura Mohun Sahu*, H. C., 27th July, 1864; *Radha Sundair Guptia*, 27th July, 1865.

(*b*) *Raja of Burdwan*, Sutherland, P. C., 152.

(*c*) Smith, 13.

(*d*) *Judo Nath Ghose*, H. C., 21st November, 1864.

(*e*) S. D., August, 1861, 113.

require the same stamp as an ordinary conveyance. Leases reserving a rent, made without any payment by way of premium, are subject to a graduated scale of duty. If the lease be for a term not exceeding a year, the duty is about one-half per cent. on the rent. If for a term exceeding a year, the duty is about one per cent. on the rent. Leases for an indefinite term reserving a rent, and made without any payment by way of premium, require the same stamp as leases for a term exceeding one year. Leases reserving a rent, and made in consideration of a fine or premium, require a stamp of value equal to the joint value of the stamps for a conveyance in consideration of the fine, and a lease for the rent. *Zaripeshgi* leases are stamped both as leases and as mortgages (*a*). Counterparts require the same stamps as leases. All leases executed to, or counterparts executed by, any *ryot* or actual cultivator, provided that no fine or premium be paid as part of the same transaction, are exempt from stamp. There are several rulings as to this exemption. When the *kabuliyat* purported to be given by a *ryot*, and not by a middleman, it was held to be within the exemption, notwithstanding that the lands had been sub-let and cultivated by under-tenants subsequently to the execution of the *kabuliyat* (*b*). But in another case it was said that, if it appears the lands were cultivated by *koorpha ryots* at the time the *kabuliyat* was given, it is inadmissible without a stamp (*c*). If any portion of the land is in the personal occupation of the lessee, the lease is within the exemption (*d*). But since the enactment of Act X, which recognises the power of *ryots* to underlet, it may be that the fact of a *ryot* having granted a sub-lease would not deprive him of the benefit of this exemption. In the case of old leases, reference must be made to former stamp laws. Section 12, Regulation I, 1814, exempted from stamp all leases granted to

(*a*) S. D., 1850, 424; 1853, 569, 641.
(*b*) S. D., 1852, 709; 1857, 1182.
(*c*) S. D., 1854, 345. See Construction 635.
(*d*) S. D., 1859, 1470.

tenants of *mal* lands (*a*). Under the general exception at the end of Schedule A, Act X, 1862, leases executed by Government officers on behalf of Government are exempt from stamp; and as the stamp on counterparts is governed by the stamp on the lease, it would seem that counterparts of such leases are also exempt, though it is the practice to stamp them. By Section 14, unstamped deeds cannot be received "as creating, transferring, or extinguishing any right or obligation, or as evidence in any civil proceeding; nor can they be acted upon by any Court or public officer, or registered or authenticated by any public officer." In one case it was said that admission by the opposite party cures any defect of stamp on the *pottah* or *kabuliyat* (*b*); but this ruling does not seem to be reconcileable with the law quoted.

Registration of leases.—Under the old Registration laws, (Regulation XXXVI, 1793; Act I, 1843; Act XIX, 1843,) registration was not a formality indispensably necessary to render leases admissible, but merely an optional one adopted for the greater security of the title. Neither did registration under those laws ensure the validity of the registered title to the exclusion of all unregistered titles. When a previous unregistered title was fully proved, and possession under it, it was not affected by a subsequent registered title. It was only when two deeds were of contemporary date, and the evidence as to each was equally balanced, that preference was given to the registered deed (*c*). But in a case recently decided by the Privy Council, it is said that the deed registered first cannot be deprived of the priority given to it by Act XIX, 1843, unless it be both alleged and proved that it was fraudulent (*d*). By Act XVI, 1864, which took effect from 1st January, 1865, the registration of all

(*a*) S. D., February, 1861, 77.

(*b*) S. D., 1857, 1827. See also S. D., 1847, 38, 43; Constructions 392, 790; and Chapter III, "Evidence for plaintiff in rent suits."

(*c*) H. C., 3rd September, 1862. *Mohessur Bux Singh*, 16th January, 1866, S. D., 1858, 335, 960, 1051. *Kasi Pandu*, H. C., 5th April, 1867.

(*d*) *Srinath Bhuttacharyya*, Sutherland, P. C., 600.

leases for terms exceeding one year was made compulsory, but the registration of counterparts was left optional. By Act XX, 1866, (the present law,) which took effect from 1st May, 1866, all leases for terms of more than one year must be registered; and by Section 2 of the Act the word "lease" includes *kabuliyat*. The registration of other leases is optional. By Section 49, if a deed, of which registration is compulsory, be left unregistered, "it shall not be received as evidence in any civil proceeding, or acted upon by any public servant, or affect any property comprised therein." When such a lease is unregistered, the Courts cannot allow the title to be proved by parol evidence (*a*). But this provision does not prohibit the reception of unregistered deeds executed before the new law came into force (*b*). By Sections 48 and 50, all deeds registered under the Act take effect against every oral agreement and every unregistered deed relating to the same property. It is difficult to conjecture how these Sections will be construed. Surely the title of a *kadimi* tenant holding without lease cannot be defeated by the grant of a written lease to a stranger?

A special registration of *talukdari pottahs* was provided for by Section 48, Regulation VIII, 1793, which required that, within three months after the conclusion of the settlement, the *zamindars* should deliver to the Collector "a record of the engagements entered into between them and the dependent *talukdars*, specifying their names and *taluks*, and the *jama* payable by each." It was formerly held that the absence of registration under this Section was conclusive evidence that the *taluk* was not in existence at the settlement (*c*); but it has been recently laid down that the *zamindar's* negligent or fraudulent omission to register a *taluk* under this Section will not

(*a*) *Bishen Mayi*, H. C., 15th December, 1866.
(*b*) *Karulall Thakur*, H. C., 21st June, 1867.
(*c*) S. D., 1849, 611.

defeat the *talukdar's* title, if it can be proved by other evidence (*a*).

In strict law, *mukarrari* tenures ought apparently to be registered in the *lakhiraj* registers under Regulation XIX, 1793, and Section 3, Regulation VIII, 1800, inasmuch as Section 4, Regulation II, 1819, extended all the provisions relative to *lakhiraj* tenures to *mukarrari* tenures. The penalty for non-registration is declared by Sections 19, 21, Regulation VIII, 1800, and Section 12, Regulation III, 1828, to be immediate resumption. But this species of registration has never been carried out, and the penalty would probably never be enforced (*b*).

Verbal grants of tenancies.—A written lease is not indispensable to a valid tenancy (*c*). The mere fact of the contract of tenancy not having been reduced to writing, does not invalidate the claim of the landlord to his rent (*d*). Since, in this country, there is no law, like the Statute of Frauds, rendering null and void contracts not reduced to writing, such verbal leases may be proved by evidence of the words used. And sometimes tenancies are created without any express agreement at all, and simply by the conduct and mode of dealing, which is understood to signify an intention to enter into that relation. In one case it was said:—"By the law of Landlord and Tenant, as applied in England, a person who takes and cultivates the lands of another (there being no express permission to cultivate on the side of the landlord, nor any express agreement to pay rent on the side of the tenant) would not be regarded as a tenant, but treated as a mere trespasser. But here it is a very usual thing for a man to squat on a piece of land, or to take into cultivation an unoccupied or waste piece of land. Tenancy in a great many districts of Bengal commences in this way; and

(*a*) *Daya Mayi*, H. C., 28th February, 1863.

(*b*) See *Umritnath Chowdhry*, H. C., 27th August, 1862.

(*c*) Constr. 380, 574, S. D., 1847, 403; 1853, 571.

(*d*) *Janki Pershad*, N. W. P., 7th January, 1863.

when it does so commence, it is presumed that the cultivator cultivates by permission of the landlord, and is under an obligation to pay him a fair rent, when the latter may choose to demand it. If the *ryot* chooses to cultivate the *zamindar's* lands, and the *zamindar* lets him, there is an implied contract between them creating the relation of landlord and tenant" (*a*). Questions as to what holdings of this sort constitute a tenancy under an implied contract, are constantly arising in suits for rent and for *kabuliyats*, and in cases where a tenant has usurped additional lands, or held over beyond the term of the original lease, without express license. The decisions of the Calcutta High Court, governed by the lawyer-like wish of keeping the law of contract distinct from the law of torts, and following English precedents in suits for "use and occupation," have recently shown a strong tendency to regard all persons holding without a clear contract as trespassers (*b*). On the other hand, the old Sudder Court and the Agra Court, from a consideration of the usages of the country, and a due unwillingness to "refer people to the Civil Court," were generally accustomed to regard such holders as genuine tenants. The cases are all collected under the heads of "Suits for rent and for *kabuliyats*" in Chapter III, and "Holding over" in Chapter V. It would seem that each case should be decided according as the presumable intention of the tenant, at the time of taking the land or holding over, was to pay rent or not. In the first case a contract can be presumed, in the latter not.

Nature of rent.—The word "rent" means a *redditus* or return for the use of land occupied by another than the proprietor; but, as observed in Chapter I, it is only since 1793 that the

(*a*) *Nitanand Ghose*, H. C., 20th June, 1864.

(*b*) It may be observed that the convenient practice of "waiving the tort and suing on the implied (or more properly *quasi*) contract" is not altogether unknown, even in English law. See *Churchward* v. *Ford*, II. H. & N., 446, quoted in Woodfall under "Use and Occupation;" and Broom, 777.

payments made by the under-tenants and *ryots* in this country have assumed this character. Before that year they were more of the nature of a tax or tribute imposed by the Government, and were not paid in virtue of any contract, express or implied. All the vernacular terms for rent express the idea of a tax,—*e. g.*, *Khiraj*, "tribute levied by Muhammadans from infidels;" *Khazana*, "treasure;" *Mal*, "wealth," the "wealth of the State" or "revenue;" *Malguzari*, the "revenue;" *Jama*, the "gross revenue;" *Lagan, lagai*, the "revenue assessed on a field." The word *bhara*, "recompense," is perhaps the most exact translation of rent, but it is rarely, if ever, used of the rent of land. *Kar* means "tax;" "*Bhej*, "instalment of rent;" *Rajashya*, "revenue;" *Tahut*, "assessed rent." The names of the different kinds of rent are exceedingly numerous, but they all fall under two classes, *viz.*, cash rents and rents paid in kind.

Cash rents.—The most common method of adjusting cash rents, at the present day, is by fixing a certain rate per *bigha* for each quality of land, and *ryots* who pay rents adjusted in this way are called *hari* (from *har*, a rate). Sometimes the rates are adjusted, not according to the various qualities of land, but according to the crops produced, and *ryots* paying rent according to these rates are called *fasli (a)*. Thus a *bigha* of land cultivated with mulberry pays a much higher rent than one sown with rice. The word *raiati* (perhaps from *rai*, a rate) is sometimes used of lands paying cash rents, as opposed to those which pay in kind. A *raikunkuti* is said of lands paying cash rents fixed according to the amount of produce per *bigha*. *Halhasili* means "land yielding a rent which varies with the crops."

For the purposes of rent assessment, lands are described by a variety of names, according to their situation, the crops they produce, or the quality of the soil. Instances of the first are *Dih*, *Gaonwar*, *Dubhalis*, *Gabhan*, *Bara*, lands in or close to the village, and considered the first quality. *Manjha* lands at a

(*a*) II Harington, 65. See Clause 1, Section 57, Regulation VIII, 1793.

moderate distance from the village, considered second quality. *Tal*, *Matan*, (*a*) and *Chork* signify the outlying low lands. *Paiwust*, *Nauberar*, *Deara*, and *Chur*, alluvial land. *Uperwar*, *Bhita*, *Kaimi*, old lands as opposed to alluvion. *Oodbastoo*, lands formerly built on or near building sites. *Bastoo*, building sites.

Names of lands according to the crops produced on them are *Baghat*, "garden lands;" *Posta*, "poppy lands;" *Gochar Goalar danga*, "pasture lands;" *Doras*, *Jhuntar*, *Dofasli*, "land yielding two crops a year;" *Ekdhan*, "land yielding one crop a year;" *Danga kurpa*, "lands yielding cotton;" *Sona*, "land yielding *Aus* rice;" *Shali*, "land which yields *Amun* rice" (*b*); *Polach*, "land yielding crops all the year round;" *Chowmas* is said of land held during the four rainy months, *Assar* to *Assin*, and also of lands sown after the rains, when they have not been cropped previously; *Jivat*, "arable lands;" *Amoniya*, or *Hemantik*, is "land which yields *Amun* rice;" *Rubbeea*, "lands on which the *rubbee* crop is grown."

The names of lands, according to the quality of the soil, are almost interminable. Ground more or less low and swampy is named *Chachar*, *Doba*, *Nina*, *Khadar*, *Kachar*, *Jalla*, *Jhabar* or *Jhawar*, *Jalganda*. High dry land is called *Sona danga*, *Tikan*. Rich loam, *Kali bhumi*, *Kankalat*, *Dhankur*, *Bharki*. Poor light sandy soils, *Kalai danga*, *Balua*, *Bhud*, *Bharua*, *Garawa*, *Talchan*.

(*a*) *Matan* also signifies a plot of land granted to a *ryot* rent-free in consideration of his bringing waste lands into cultivation.

(*b*) The *Aous* or "early" rice is sown in *Chyt*, *Bysakh*, and *Jeyth*, and cut in *Srabon* and *Bhadron*, at the same time as the *Bhadavi*, Indian corn, crop of Behar, which is sown in *Assar*. It is also named *Beali* in Cuttack. The *Amon* or *Hemanto (hiems)*, winter crop, also called *Kertiksali*, is sown in *Assar*, transplanted in *Srabon*, and cut in *Pous*. It is called *Sarud* in Cuttack. The corresponding Behar crop is the *Kharif* or *Aghani*, which is sown and cut about a month earlier. The *Rubbee* (from *rabi*, sun) or spring crop of cereals, pulses, oilseeds, cotton, and poppy in Behar, is sown in *Kartik*, and reaped in *Phalgoon* and *Cheyt*. The *Boro* rice of Bengal is sown in low swampy ground in *Pous*, and reaped in *Bysakh*. *Maghat fasl* is said of all sown after *Magh*.

Salt lands, *Noncha, Khari mutti, Khar.* Clay lands, *Sigoun.* Fallow lands, *Khil, Charan, Kala Bhangar, Purti, Banjur, Potit, Uthit potit.* Rotten sodden lands are called *Gahua, Sada. Dorus*, or *Balsundar*, is a mixture of clay and sand. *Kewal*, a black loam. *Mattiar*, a rich clay soil with a little sand. *Jita bhumi* and *Polach*, land retaining its moisture all the year round, and never left fallow.

Particular rates of rent are sometimes levied for particular crops. Thus, *Honti* is a rate levied on account of the *Boro* crop, when that is the only one sown in the year. *Jurighali* is a rate to include inferior crops. *Mochara* is a rate for the winter crop, when it is the only one sown. *Shali* means the same. *Rashti*, an additional rate for occupying waste lands. *Namudar* is a rent settled by inspection of samples of the crop. *Beera*, a rent varying according to the quality of the land and the crops. *Basauri, Dihauri, Prajawat* or *Parjote*, a ground-rent paid by non-cultivators for building sites. *Haldari* is a rate per plough.

Rents paid in kind.—The *Zamindar's Khamar* lands are, in Bengal, very generally leased out to cultivators on condition of their paying half the produce or its value in money, and tenants holding on these terms are called *Khamar* (*a*). The tenancy is also called *Bhagjot* and *Shaji* (partnership), *Ardhasiri, Banti, Zamin*, and *Bhag khamar*. In the province of Behar whole villages are often held on these terms. The general name for these tenancies in Behar is *Batai* or *Bhaoli, i. e.*, a distribution of the produce between *zamindar* and *ryot*. Under the *Agore* (*b*) *batai* tenure, the crops are divided after they have been reaped, and placed on the threshing-floors. And it has been held that the *zamindar* has no right to interfere with the standing crops by sending his own servants to cut them (*c*). Under another

(*a*) II Harington, 65.

(*b*) This name is said to be derived from *agorna*, "to watch," from the careful watch and ward necessary to prevent the crops being abstracted before division.

(*c*). S. D., 1845, 197.

system, a valuation or estimate is made of the probable produce of the crop while it is still green, and the landlord's proportion settled accordingly. This is called *Danabandi* and *Kunkut*. When any distinction between these terms is made, it is said that the *Danabandi* is a more summary mode of valuation than the *Kunkut* (*a*). The *Patwari*, *Berahil*, and *Jeth ryot* or *Mundul* usually make the valuation, and it is entered in what are called *Kut*, *Takhmina*, *Thokbandi*, or *Khasra* papers, which should be signed by the appraisers. Two other kinds of *Bhaoli* tenure are mentioned, but they are not often met with: *Khet batai*, under which a portion of the field is measured off, and its produce appropriated to the landlord, and *Lang batai*, which appears to differ little from *Agore batai* (*b*). Also it is said that the valuation or estimate of the crop is sometimes made after the crop is ripe, by cutting a portion, threshing it out, and weighing the grain.

The most usual proportion taken by the landlord is one-half (*c*). But a division called *nau satta*, under which nine parts go to the landlord, and seven to the tenant, is not uncommon in Behar. This is said to cover all cesses, and appears to have been the usual proportion taken by the Government in Behar during the later periods of Muhammadan rule (*d*).

(*a*) Wilson derives this word from *Kan*, valuing, and *Kut*, estimate, or from *Kana*, an ear of corn. The former is no doubt correct, as the common question in these cases is "*Kon Kan kya ?*"

(*b*) *Ayin Akbari*, quoted in Briggs, 123.

(*c*) These recognised and definite proportions for all lands, good or bad, and for all neighbourhoods, populous or thinly peopled, are a standing instance of rents regulated by custom, and not by competition. "Whether the proportion is two-thirds or one-half, it is a fixed proportion, not variable from farm to farm, or from tenant to tenant. The custom of the country is the universal rule. Nobody thinks of raising or lowering rents, or of letting land on any other than the customary conditions. Competition, as a regulator of rent, has no existence." Mill. Political Economy, Book II, Chapter IV, Section 2.

(*d*) III Harington, 324.

In Benares there is said to be a peculiar division called *noasia* or *hariaun*, under which nine-sixteenths go to the *ryot*. Under the *chaukara* and *chuhkara*, the *ryot* paid one-fourth and one-sixth; but these rarely, if ever, occur (*a*). The shares are called *Hissa hakimi* and *Hissa ryotti* respectively, and together *Har do hissa* (*b*).

In some, but very few, of these tenancies the landlord makes advances (*takavi*) of seed, and these correspond so far to the *metayer* tenures of France and Italy. The *Barga* tenant gets an advance of half his seed, and the *Lagan wala* is said to receive a certain advance. Tenants cultivating newly-formed lands (*Bhaoli khil*) sometimes get a larger proportion of the crop than tenants of old land (called *Bhaoli pa.*) If rents in kind are honestly paid, they are much more profitable to the landlord than money rents, as they are higher to begin with, and rise in value of themselves as prices rise. But in large estates they hardly ever are honestly paid.

Cesses or Abwabs.—A great many taxes were imposed by the later Muhammadan Governors in addition to the regular assessment on the land or *asl jama*. It is said in Grant's "Analysis of the Finances of Bengal" that, at the time of the cession of the *Dewani* to the Company, they amounted to 32 per cent. on the *asl jama* fixed by Todar Mull in 1582 in the reign of Akbar (*c*). These cesses were variously designated, either after the princes

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(*a*) According to Sir J. Shore and Elphinstone, p. 475, the Government share in Muhammadan times was about one-third of the gross produce. According to Grant, about one-fourth. Harington III, 233. *Abul Fuzl* says the Hindoo *Rajas* took one-sixth. Briggs, 115, 125.

(*b*) Like *tous les deux*.

(*c*) See Fifth Report, 275. Todar Mull's assessment (which is described in Elphinstone, p. 475,) was also termed the *jama kamil tumari*. It was modified in Bengal by Sultan Shuja in 1658, and again by Jaffir Khan in 1722. Up to the Decennial Settlement, the term *asl jama* was always taken to mean Todar Mull's assessment. Memoir 40. A list of these cesses is given in the Fifth Report, p. 275, and in Harington III, 435; see also p. 236.

by whom they were imposed, as *Abwab Kasim Ali Khan*, or from the pretext on which they were raised, as *Abwab Foujdari*, a "tax on liquors;" *Abwab Rahdari*, "a road tax;" *Abwab Patak* "taxes on the wicked," or eight inferior castes. The general term for them was *Abwab*, *(plu.* of *bab)* "heads or sections of taxation;" also *Mathaut*, (from *matha*, the head,) "capitation taxes."

By Section 54, Regulation VIII, 1793, it was enacted that "the impositions upon the *ryots* under the name of *abwab* and *mathaut*, from their number and uncertainty, having become intricate to adjust, and a source of oppression to the *ryots*, all *zamindars* and *talukdars* were to revise the same in concert with the *ryots*, and consolidate the whole with the *asl jama* into one specific sum." By Section 55, "no new *abwab* or *mathaut* was to be imposed under any pretence whatever," and every exaction of this nature was to be punished by a penalty equal to three times the amount of the cess; and by Section 61, suits brought on *kabuliyats*, wherein the consolidation should appear not to have been made, were to be dismissed with costs. Section 4, Regulation XII, 1805, enacted corresponding rules for Cuttack. But Section 3, Regulation V, 1812, which abolished the requisition of formal *pottahs*, modified this;—"nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathaut*, or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts to be null and void; but the Courts shall, notwithstanding, maintain and give effect to the definite clauses of the engagements contracted between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them." By Section 9, Regulation IX, 1825, whenever detailed enquiries have been made by a Settling Officer, under Section 9, Regulation VII, 1822, no cess will be allowed which does not appear in the settlement *jama bundi*.

In construing these Sections, it has been held that Regulation VIII, 1793, does not disallow cesses which may have been in force prior to 1198, F. S. (1790), but only prohibits the imposition of new *abwabs* (*a*). In another case it was said that the object of these provisions was to prevent the imposition of new cesses under any pretence at all, and also the levy of arbitrary and indefinite cesses existing at the Settlement. To obtain the last end, such arbitrary cesses were to be consolidated with the rent, and to obtain the first end, a penalty was provided in the case of an imposition of new cesses. And by Regulation V, 1812, the Courts are to give effect to all stipulations for payment of definite cesses ; and it is only stipulations for the payment of indefinite cesses that they are required to disallow. Thus the Court enforced the terms of a *kabuliyat* agreeing to pay certain cesses of specific and definite amount, such as *salami*, *panchgaon*, and *chokidari*, which, though not consolidated with the rent, were yet consolidated into one specific sum with the rent under their own designations (*b*). If cesses, under whatever names, be included in the *kabuliyat*, and are in their amount specific and definite, they are legal demands. The term " demands of all kinds" entered in a *kabuliyat* is not within the prohibition, provided the whole amount to be paid is specific and definite (*c*). On the other hand, in some cases, cesses have been disallowed on grounds irrespective of the definiteness or otherwise of the amount. A claim for *chanda* and *kazi's* fees was rejected (*d*). So too the items *Burdana*, *Kutwali tamacu*, and *Batta* were disallowed (*e*). A claim by a *zamindar* from a farmer on account of *zabta batta* was dismissed (*f*). One of the Constructions rules that a claim for

(*a*) S. D., 1848, 442.
(*b*) S. D., 1857, 1508.
(*c*) S. D., 1858, 574, 1954.
(*d*) S. D., 1852, 4, 552.
(*e*) S. D., 1848, 680.
(*f*) VII, S. R., 142.

batta on account of short-weight rupees is illegal (*a*). In a recent case, the High Court said it was unnecessary to scrutinize the character of a cess very narrowly when there were grounds for supposing it to be warranted by local custom (*b*). The North-West Court invariably refuse to allow cesses which have not been allowed and recorded at the settlement (*c*).

The cesses usually met with now are *Dak bahri*, a cess for the *zamindari* post; *Band behri*, for embankment expenses; *Chokidari*, for the *chokidar's* pay; *Nim ana Patwari*, the *Patwari's* fee; *Kayali*, *Bayai*, *Chunga*, the weighman's fee in *Bhaoli* tenancies; *Jarib Maukufi*, a cess in lieu of measurement; and generally *Mangna* and *Chanda*, whenever the *zamindar* has subscribed to any Government project, or has incurred unusual expenses of any sort. *Mangna* in Behar is the perquisite of the *Jeth ryot*. *Parbani* is a cess to defray expenses of holdings. *Kadkareh* is another general name for cesses (*d*).

Pergunnah rates.—In his Minute for the Decennial Settlement, Mr. Shore states that "in every district in Bengal where the license of exaction has not superseded all rule, the amount

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(*a*) Constr. 294.

(*b*) *Lall Kissen Naik*, H. C., 18th November, 1862.

(*c*) *Bhagwan Sing*, N. W. P., 18th April, 1865; *Ram Jiwan*, N. W. P., February 11th, 1862.

(*d*) Mill thinks the existence of cesses a proof that the *rate* of rent was according to ancient custom unalterable. "When an old principality falls under the dominion of the British Government, and the details of its revenue system come to be enquired into, it is usually found that, though the demands of the great landholder—the State—have been swelled by fiscal rapacity until all limit is practically lost sight of, it has yet been thought necessary to have a distinct name and a separate pretext for each increase of exaction; so that the demand has sometimes come to consist of 30 or 40 different items in addition to the nominal rent. This circuitous mode of increasing the payments would assuredly not have been resorted to, if there had been an acknowledged right in the landlord to increase the rent. Its adoption is proof that there was once an effective limitation, a real customary rent." Political Economy, Book II, Chapter IV, Section 2.

of the money rents is regulated by known rates fixed with respect to the produce at so much per *bigha*" (*a*). In some cases the records of these rates were preserved in the *Kununga's* offices (*b*); and there is no doubt whatever that, under the earlier Muhammadan rulers, each *Pergunnah* had its own definite and recognised rates of money rents, just as there are definite and recognised rates of rents in kind at the present time. Section 60, Regulation VIII, 1793, recognised the right of *khudkasht ryots* to hold at *pergunnah* rates. Section 6, Regulation IV, 1794, enacted that all disputes as to the rates of rent were to be settled by the Courts according to the *pergunnah* rates. Section 7 of the same Regulation appears to recognise the right of all *ryots* to hold at *pergunnah* rates, as it provides that all *ryots* whose *pottahs* might be cancelled by the operation of Regulation XLIV, 1793, should be entitled to take out new *pottahs* "at the established rates of rent paid for lands of the same quality and description" (*c*). But no enquiry was ever made by Government to ascertain what these *pergunnah* rates really were. In the prosecution of such an enquiry, there was this essential difficulty to encounter;—that, during the previous fifty years at least, a constant struggle had existed between the *ryots* endeavouring to evade payment, and the *zamindars* trying to exact the largest possible amount. The village records were lost. Custom, and not law, was to be the only guide, and hence suits as to rates were sometimes decided on diametrically opposite principles (*d*). In Regulation VII, 1799, it was said that the actual rights of landholders and

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(*a*) Fifth Report, 162.

(*b*) Memoir 40. *Kununga*s were revived in 1816 or 1817, but were underpaid, and proved a failure. Mr. Kemp's Minute, 27th May, 1864.

(*c*) See also Section 5, Regulation XLIV, 1793, and Clause 5, Section 29, Regulation VII, 1799.

(*d*) Fifth Report, 70, quoted in Briggs, 184 and 357. Mr. Trevor says "*Pergunnah* rate" means the *asl* or original rate fixed by *Todar Mull*, plus the cesses consolidated with it at the Settlement. H. C., 19th June, 1865.

tenants could be ascertained and determined by judicial investigation only. It was often said that *pergunnah* rates had been done away with by Regulations V and XVIII, 1812. This, however, was a mistake. In a letter from the Board to Government, dated 11th November, 1814, it is said:—"The *ryot's* right to demand *pottahs* at *pergunnah* rates is in no respect abrogated by Regulation V, 1812; on the contrary, his title to pay according to *pergunnah* rates is recognised and enforced in Section 6; and in Section 7 provision is made for regulating the collections according to the rates paid for similar lands in places adjacent, if there be no established *pergunnah* rate" (*a*). Mr. Trevor says that, though the "*pergunnah* rate" had become indistinct by 1812, yet the limit still existed in the shape of "the rate payable for similar lands in the places adjacent," which is, in fact, the same thing. The question of *pergunnah* rates is admittedly the most difficult in the whole range of the law of landlord and tenant; for, in the first place, it is most difficult to ascertain what the real local rate is, and in the next, owing to the rapid rise of prices, what is a fair and equitable rate at one time is very inadequate 10 or 20 years later (*b*). The rulings under the existing law are collected in Chapter III under the head of "Enhancement" (*c*).

(*a*) III Harington, 484. See Construction 234; S. D., 1850, 8; II., N. W P., 386; 1860, 435; *Thakurani Dasya*, H. C., 19th June, 1865, F. B.

(*b*) In V S. R., 102, the local rate is said to have risen.

(*c*) *Pergunnah* rates are another instance of rent adjusted by custom, and not by competition. They correspond to the fines of "reasonable amount" paid by copyholders.

CHAPTER III.

CONTINUANCE OF TENANCY. RIGHTS OF LANDLORDS.

The points arising during the continuance of tenancy relate to the respective rights, *first*, of the landlord as against the tenant; and, *secondly*, of the tenant as against his landlord.

First.—With regard to the rights of the landlord, it is obvious that they must relate either to the remuneration he is entitled to receive for his land while let to the tenant, or to the condition in which the land is to be kept by the tenant. Under this head, therefore, will be described—

(1.) The landlord's right to the due payment of the rent, and the various remedies by which that right is enforced.

(2.) The right which exists in certain statutory tenancies of re-adjusting the rent from time to time, and the remedies by which that right is enforced.

(3.) Subsidiary to the last, the right of measuring the tenant's land, with the mode of enforcing it.

(4.) The right to receive from the tenant a *kabuliyat* or written agreement specifying the rent and the terms of the tenancy, and the remedies by which that right is enforced.

(5.) The rules as to "waste."

I.—Right to rent and mode of enforcing it.

In the last Chapter, the nature of rent in money and in kind, and the rules regarding *abwabs*, have been discussed. The points

which remain to be touched on are:—(1) the time at which rent is payable, and the penalties on default; (2) the mode of payment; (3) the amount payable; (4) the various remedies for enforcing payment.

Time of payment and interest on arrears.—Rent is payable on or before the day specified in the lease; or, if there be no lease, at or before the time settled by established usage. By Section 20, Act X, any instalment of rent not paid at such time "shall be held to be an arrear of rent, and, unless otherwise provided by written agreement, shall be liable to interest at twelve *per centum per annum.*" Under the former law, Act XXXIX, 1839, (corresponding with 3 and 4 Will. IV, Chapter 42, Section 28,) when there was no express agreement for the payment of interest, it could only be awarded when the landlord proved that he had demanded the rent, and accounted for any delay in bringing his suit (*a*). But under the present law, proof of these matters is unnecessary, as it is the tenant's duty to tender payment of rent without waiting for a demand to be made. Interest cannot now be refused on the ground that no demand was made for payment of the rent (*b*); nor is unnecessary delay in instituting suit any ground for refusing interest (*c*). When there is a special agreement for the payment of interest, the Court has no discretion in the matter (*d*). But when there is no such agreement, the Court is not bound to award interest under this Section (*e*). Non-acceptance of rent, when tendered,

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(*a*) *Nilkant Banerjee*, S. D., 1852, 508, S. D., 1860, December, 332. This law was the origin of the anxious desire always seen in *mooktaris* and *amlah* to take evidence of "*tulub takaza*," even to the exclusion of the weightier matters of the law.

(*b*) *Surat Sundari Debya*, H. C., 24th April, 1866.

(*c*) *Dulhan Bakht*, N. W. P., 21st November, 1863.

(*d*) S. D., 27th March, 1862.

(*e*) *J. Beckwith*, H. C., 13th February, 1863; *Kashinath Rae*, 21st September, 1864; *Indurjit Kunwer*, 22nd August, 1864.

is a good ground for refusing interest (*a*). When a *zamindar* sued for enhancement, and the rent was fixed at one-third of his demand, and he afterwards sued for arrears at the rate fixed, the Court refused interest for the period antecedent to the adjustment, as it did not appear that he had ever asserted to take any smaller sum than his first extortionate demand (*b*). Interest was not allowed on arrears which had accrued prior to the passing of Act X (*c*). Interest cannot be awarded in addition to damages under Act VI (*d*). In one case it was said that acceptance of instalments of rent on dates subsequent to the days of payment specified in the *kabuliyat*, did not amount to a waiver of the landlord's right to claim the interest agreed upon in the *kabuliyat* (*e*). In a later case, in which the lessor had accepted the instalments on dates subsequent to the fixed dates of payment during a period of ten years, and the Judge found that this amounted to a waiver of the right to claim interest, the High Court refused to interfere with the finding in special appeal (*f*). Interest at the rate of one *per centum per mensem* does not mean compound interest, so as to allow of interest being charged on the rest, but interest calculated *per mensem* and payable *per annum* (*g*). Compound interest cannot be awarded (*h*).

The rules as to the appropriation of payments have frequently to be taken into consideration in determining whether any and what amount of interest is due from a tenant. These rules, as set forth in the Indian Contract Act, appear to be, *first*, that

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(*a*) *Ramsaran Dass*, N. W. P., 12th June, 1861.

(*b*) VI, S. R., 232.

(*c*) *Sinaqapi*, H C., 1st April, 1863; *Unradh Singh*, N. W. P., 17th May, 1862; *Unmole Singh*, N. W. P., October 14th, 1863.

(*d*) *Navakant Dey*, H. C., 9th September, 1864.

(*e*) *Ruttikant Bose*, H. C., 30th July, 1862.

(*f*) *Dindyal Poramanik*, H. C., 30th March, 1863.

(*g*) II, Moore, 253.

(*h*) S. D, 1851, 152, 1852, 556, 1858, 1211.

where there are several distinct debts, and the debtor, in making a payment, indicates, expressly or impliedly, that the payment is to be applied to some particular debt, the creditor must apply it accordingly; *second*, where there are several distinct debts, and those to which the payment is to be applied are not indicated, the creditor may apply it to any of them, giving the debtor notice; *third*, when neither party makes any appropriation, the payment is to be applied in discharge of the oldest debts (*a*). If one, who owes both principal and interest, makes a general payment without appropriation, it is to be applied first in discharge of the interest, and next in discharge of the portion of the principal of longest standing (*b*), unless the payor direct otherwise (*c*). If part of the debt is barred by limitation, while the rest is still liable to be sued for, in the absence of appropriation by the debtor, the creditor may apply a payment in discharge of the debt barred by limitation; but he must be prepared to prove that such debt really existed (*d*). In a claim for rent during several years, in which rent had been paid, but credited against the arrears of previous years, it was held that the existence of such antecedent arrears must be proved, and that the balance due on account of each particular year must be shown in the accounts (*e*). When the course of applying payments in discharge of interest had not been followed, and nothing but interest remained due, it was held wrong to convert that which was itself interest into a principal bearing further interest at twelve per cent. (*f*). A payment of rent must be presumed to be on account of the current year, unless

(*a*) See Smith's Equity, 338; Macpherson. Contracts, 99.

(*b*) S. D., 1850, 504; 1853, 681; 1858, 1211; *Rani Surnamayi*, 30th July, 1864; *R. Ahmuty*, H. C., 22nd February, 1864; *Rammath Rae*, 30th August, 1864.

(*c*) *Adwaitachurn Rae*, H. C., 13th July, 1863.

(*d*) S. D., 1856, 202. *Bakur Hosain*, N. W. P., July 25th, 1864.

(*e*) S. D., 1857, 192.

(*f*) S. D., 1859, 1211.

the contrary be shown (*a*). When a farming *kabuliyat* contained a condition that an advance made by the tenant was to be credited towards the payment of the rent of the closing year of the term, and also a condition for attachment, it was held that the advance might be credited against the arrears of a prior year (*b*).

Damages under Act VI, 1862, *B. C.*—By Section 3 of this Act, if it shall appear in any suit for rent "that the defendant has, without reasonable or probable cause, neglected or refused to pay the amount due by him, and that he has not, before the institution of the suit, tendered such amount to the plaintiff or his agent," or has not deposited the amount with the Collector, the Court may award damages at 25 per cent. on the amount of rent decreed. This provision is one altogether of an exceptional character. Under English law, no matter what amount of inconvenience be sustained by a plaintiff from non-receipt of money due under a contract, the measure of the damages is the interest of the money, and no more (*c*). By this Section, non-payment of rent in certain cases is placed upon the footing of a tort, and punished with "exemplary" or "penal" damages (*d*). Hence this provision is by no means to be enforced in every *ex-parte* case, or indiscriminately (*e*). Damages cannot be given unless specially alleged and claimed in the plaint (*f*). The claimant must prove a refusal or neglect to pay without reasonable or probable cause (*g*). The pendency of a suit for enhanced rent, however, is not, of itself, a reasonable cause for neglect to pay at the old rate. Damages cannot be given in

(*a*) *Taramani Dasya*, H. C., 17th July, 1864 This case seems rather to limit the landlord's power of appropriation.

(*b*) *B. Koolson*, H C., 23rd March, 1867.

(*c*) Broom, 608, *note*, 342.

(*d*) See S. D., 1858, 160

(*e*) Board's Rules, Chapter XVI, Section XI, Clause 6.

(*f*) *Hara Mohan*, H. C., 9th September, 1863.

(*g*) *Baliachand Dutt*, H. C., 22nd April, 1864.

addition to interest, or for delay in payment, before the passing of Act VI (*a*).

Mode of payment.—The tenant is bound to pay his rent to the person from whom he received his lease, till he receive notice of transfer (*b*). Proof of payment of rent to the original lessor will discharge a tenant in a suit by an assignee of such lessor when the tenant has received no notice of the assignment (*c*). But when tenants have received due notice of the transfer of the lessor's estate in execution of decree, payments made to the original lessor will not discharge them from liability in a suit by the purchaser, even if such payments have been made under order of Court (*d*). Payment to a person out of possession cannot release *ryots* from their responsibility to a farmer for the term of his lease (*e*). Proof of payment to one of two joint lessors who had always collected jointly was held to discharge a tenant when sued for rent by the other, notice of separation not having been given to the tenant (*f*). When a notice has been issued to the *ryots* forbidding them to pay rents to a revenue defaulter, and they pay him rents notwithstanding, they are liable to pay over again to the auction-purchaser (*g*). Parties paying rents falling due after the date of a sale in execution of decree to any other than the purchaser, do so at their own risk (*h*). In the case of death of the lessor, and disputes among his heirs, the tenants may always protect themselves from the chance of paying rent to the wrong party by requiring a certificate to be taken

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(*a*) *Navakant Day*, H. C., 9th September, 1864.

(*b*) S. D., 1854, 20.

(*c*) *Attapai Mulla*, H. C., 21st August, 1862; S. D., 1859, 820; August, 1860, 125. See *Nilmani Rae*, H. C., 5th December, 1865.

(*d*) *Collector of Rajshahye*, H. C., 26th January, 1864; *J. Smith*, 2nd December, 1864.

(*e*) S. D., 1850, 410; S. D., April, 1860. See other cases in Chapter VI.

(*f*) *Akbarun Nissa*, H. C., 11th August, 1864.

(*g*) S. D., 1853, 836. See Section 7, Act XI, 1859.

(*h*) *Mohessur Baksh*, N. W. P., August 28th, 1855.

out under Act XX, 1841, (now Act XXVII, 1860,) before they make any payments (*a*). Payment to a person who holds probate of a will is valid, though the will be afterwards pronounced a forgery (*b*). Payment of rent to the real *benami* lessor will discharge a tenant in a suit by the *farzi* or nominal lessor (*c*).

Regarding payment to agents, it has been held that if rent be paid to an authorized agent of the landlord, it is as effectual a discharge of the tenant as if it had been paid to the landlord in person. By Section 53, Regulation VIII, 1793, no agent can collect rents without an *amlnama* or written commission. A *kurk sazawul*, by virtue of his office, is an agent authorized to receive rent (*d*). But a tenant is not safe in paying rent to a "particular agent" who cannot produce express authority to receive it (*e*). Yet, even though the agent may have had no authority to receive the rent, if the landlord subsequently recognise and sanction his receipt of it, the tenant is absolved (*f*). The personal liability of the tenant is not lessened when he pays rent through an agent of his own; for if the agent misappropriate the money in transit, the principal is still liable (*g*).

Payment of rent, as of other debts, may be made in cash or in anything which the parties mutually agree to treat as an equivalent. When the landlord granted receipts for rent to a tenant on transfer to himself of receipts for rent due to the tenant from the landlord's *zamindar*, these receipts were held to exonerate the tenant (*h*). When a tenant, by *ijazatnama*

(*a*) S. D., 1851, 488; 1853, 898. But see *Beni Madhub Ghose*, H. C., 11th September, 1866, F. B.

(*b*) Macpherson. Contracts, 94.

(*c*) *Harak Pandy*, H C., 29th June, 1864.

(*d*) S. D., 1852, 1102; see S. D., 1858, 1547.

(*e*) S. D., 1855, 351. An order to pay to an agent is called *Wajuhat perwana*.

(*f*) S. D., 1849, 474.

(*g*) S. D., 1850, 314

(*h*) S. D., 1859, 1473.

from his landlord, was permitted to pay the Government revenue due from the latter, such payment was held to be a good discharge of the rent due from him, even as against an assignee of the landlord who had succeeded to the property without notice to the tenant (*a*). When a tenant was authorized by his landlord to pay his rent to a creditor of the landlord, and the creditor afterwards obtained a decree against the tenant for the amount, it was held that the landlord could not recover the amount from the tenant, even though the creditor's decree were unsatisfied (*b*). Whenever rent is paid to a creditor of the landlord under the landlord's order, such payment is a good discharge (*c*). But all voluntary payments of rent made to third parties are invalid as a discharge, when the landlord has not assented to the arrangement (*d*).

In certain cases the tenant is entitled to set-off payments made by him on account of his landlord against the rent. A payment by a *putneedar* of the Government revenue, in order to save the superior estate from sale, may be set-off against the rent due to the *zamindar* (*e*). Under Act XXXII, 1860, the tenant could set-off payments of income tax on the landlord's account against his rent. And it seems to be a general rule of Indian, as it is of English, law, that the tenant is entitled to treat as a discharge of the rent all such payments as, by default of the landlord, he is compelled to make to third parties to protect himself in the enjoyment of his land, the principle being that the compulsory payment by the tenant of such charges is, in

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(*a*) *Attapai Mulla*, H. C., 22nd August, 1862.

(*b*) *Karmi Lall Thakur*, H. C., 18th March, 1863.

(*c*) *Jai Kunwer*, H. C., 18th July, 1864. A person who lends money to a *jamigdar* on condition of receiving the rents from the *ryots* is called a *zamozdar*. Orders by a landlord to pay rents to his creditors are called *tankhwah* or *barat*.

(*d*) S. D., 1858, 1039.

(*e*) *Jotendra Mohun Thakur*, H. C., 11th November, 1864; Section 13, Regulation VIII, 1819.

truth, a partial eviction of the tenant by parties having claims on the land paramount to the landlord's claim, against which the landlord is bound to protect his tenant (*a*).

Any local custom as to the payment of rent that can be established must be admitted (*b*). Thus, in some places, it is usual to allow deductions on account of land shaded by trees, or taken up by *ails*, or boundary ridges. When the *ryot* resisted a distraint on the ground of the rent being payable, under the village custom, to a certain sharer other than the distrainer, and this was proved under Section 112, Act X, the distraint was adjudged informal (*c*).

Ordinarily, rent must be paid at the place specified in the *kabuliyat*, if there be one, or at the customary place; but in a case in which the *kabuliyat* specified a particular place, and the landlord had received rents at other places, it was held that the landlord's conduct raised a presumption that the contract was varied, and payments made at other places than the one stipulated were held valid (*d*).

There is sometimes a stipulation that all payments of rent shall be entered on the back of the lease, and that no payments which are not so entered shall be deemed valid; but, notwithstanding this stipulation, it is ruled that unentered payments are valid (*e*). The mode of payment of rents in kind has been sufficiently set forth in the last Chapter.

Landlord's lien.—Rent is considered by the law as a debt of a very high nature, and in the case of "tenures," *i. e.*, heritable and transferable tenancies in perpetuity, the tenure itself is hypothecated for the due discharge of the rent. The landlord has a lien (*kafalat*) for the amount on the tenure itself, which is liable to be

(*a*) Smith, 130, *note*. See "Right to quiet possession" in Chapter IV.

(*b*) *Gouri Prasad Dass*, H. C., 3rd August, 1866.

(*c*) *Sheobalak Singh*, N. W. P., 14th May, 1862.

(*d*) *Rakhal Dass Mokherjya*, H. C., 29th April, 1863.

(*e*) S. D., 1853, 44; 1852, 540; *Kali Dass Mitter*, H. C., August 8th, 1867.

sold in satisfaction of the debt. For the satisfaction of all the other debts of the tenant, only his "right and interest" in the tenure can be sold; but to satisfy the rent due from the tenure, the tenure itself is liable to sale (*a*). The *zamindar's* right to sell the tenure in satisfaction of the rent due upon it, takes precedence of all prior liens on the tenure (*b*). By Section 106, Act X, a transfer of the tenure, even if it have taken place before the date of sale of the tenure in execution of a decree for the rent of such tenure, is invalid against the purchaser at the rent sale, unless the prior transfer has been duly registered in the landlord's *sheristah* (*c*). So long as any rent remains due from the tenure, the lien of the landlord upon the tenure takes precedence of all other titles (*d*). In another case it was said that it is only for one year that rent remains the first charge on the tenure (*e*). And this view is somewhat confirmed by the fact that, by Clause 3, Section 17, Regulation VIII, 1819, "no former balances of *putnee* rents, beyond those of the current or last year preceding," can be satisfied by the process of summary sale under that Regulation. If a landlord recognise a transferree of the tenure, he, of course, parts with his lien on account of the former tenant's arrears (*f*). In the case of *ryotti* tenancies of all kinds, the landlord has a lien on the produce. By Section 112, Act X, "the produce of the land is held to be hypothecated for the rent due in respect thereof;" and by Section 139, "no claim to any such produce, which, at the time of distress being made, shall be found in the possession of the defaulter, whether such claim be in respect of a previous sale, mortgage, or other-

(*a*) *Satish Chander Rae*, H. C., 27th June, 1865; S. D., 1859, 472.

(*b*) S. C. and *Ramjiwan Chowdhry*, H. C., 21st November, 1865.

(*c*) See *Cohn, Feilmann & Co.*, H. C., 14th June, 1862; *Huri Churn Bose*, H. C., 30th March, 1867.

(*d*) *Durga Prasad Bose*, H. C., 14th April, 1864; *J. F. Kenny*, 30th July, 1864; S. D., 1857, 808; 1858, 1632; 1859, 692.

(*e*) *Nilmani Singh Deo*, H. C., 26th February, 1863.

(*f*) *Amrit Lall Bose*, H. C., 21st March, 1865.

wise, shall bar the prior claim of the persons entitled to the rent of the land, nor shall any attachment, in execution of a judgment of any Civil Court, prevail against such prior claim." The landlord's lien for the rent is the foundation of his right to cancel all encumbrances created by a defaulter when the tenure is sold for arrears of rent. This is clearly set forth in Clause 1, Section 11, Regulation VIII, 1819, which lays down that "no transfer by sale, gift, or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the *zamindar* to hold the tenure of his creation answerable in the state in which he created it for the rent, which is, in fact, his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect under express authority obtained from such *zamindar*." These rules, however, only apply to saleable tenures and to the produce of *ryotti* tenancies of all kinds. The rent of a farm is a mere personal debt of the tenant, and does not remain the first charge on the tenancy (*a*).

In English law, some remarkable consequences follow from this doctrine of the paramount character of the claim for rent. "If a bill or note payable at a future day be given on account of an ordinary simple contract demand, *e. g.* for the price of goods sold and delivered, it will suspend the right to sue for the original demand, until the time has arrived at which the bill or note was made payable; in other words, the demand on the simple contract, being considered by the law a demand of an inferior degree, is "merged" in the note; but it is otherwise where such an instrument is given on account of rent, for that being considered a demand of a superior degree (because issuing out of the *realty*), cannot be suspended by a security of an inferior class." Therefore, by English law, if a landlord take a note at three months on account of rent, he may, nevertheless, "distrain next

(*a*) S. D., 1856, 1019.

day" (*a*). But this rule does not hold good here. When a bond was given for a balance of rent, it was held that the bond concluded the relation of landlord and tenant, reducing the matter to an ordinary civil debt (*b*). The reason of this variance is that it is a principle of English law that a promise by a creditor to give time for the payment of an existing debt is not binding, unless there has been some new consideration given for it; whereas such promise is binding in this country, whether there has been a new consideration for it or not (*c*).

Amount of rent payable.—When there is a *kabuliyat*, the amount due is ascertained from that (*d*). In the words of Regulation V, 1812, "the Courts are to enforce payment of such sums as may have been specifically agreed upon between the parties." But sometimes the *kabuliyat* has been varied by a subsequent oral agreement. Thus, when the landlord had accepted rent regularly for fifteen years at a lower rent than that stated in the *kabuliyat*, it was held that a subsequent agreement, varying the *kabuliyat*, had been entered into between the parties (*e*). On the other hand, when a suit for rent was brought on a *jama bandi*, the Agra Court held that the mere fact of the tenant having paid a lower rent than that entered in the *jama bandi* for a number of years, did not prove that his rent had been lowered by the landlord (*f*). When a tenant agreed by his *kabuliyat* to pay rent from the beginning of the year, it was held that he could not claim a deduction, on the ground that the *kabuliyat* had been executed after the harvest had been got in (*g*).

If the lease contains an agreement for the appointment of a *sazawal* in the event of an arrear, such appointment does not

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(*a*) Smith, 198.

(*b*) *Saidud Din Ahmed*, N. W. P., August 11th, 1862. A Mymensing case decided by the Sudder in 1861 was to the same effect.

(*c*) See Draft Contract Act, Section 36.

(*d*) See *H. D. Tripp*, H. C., 25th July, 1864.

(*e*) *Purnima Chowdhrain*, H. C., 21st July, 1864.

(*f*) *Rae Manik Chand*, N. W. P., 1st March, 1864.

(*g*) S. D., 1859, 1141.

release the tenant from his obligation to pay the difference between the sum collected and that specified in the lease (*a*). But a landlord claiming the difference between the amount collected by the *sazawal* and the amount really due, must prove his collections by the clearest evidence (*b*); for when a *sazawal* has been appointed, the presumption is that he has collected all that was due (*c*); and in a recent case it was said that, when a *sazawal* has been appointed, as a general rule, the landlord is not entitled to claim from the tenant the difference between the rent and the *sazawal's* collections (*d*). As the former law authorizing the appointment of *sazawals* only contemplated an attachment for a portion of a year, the tenant was not liable for short collections of a *sazawal* beyond that period (*e*). When a landlord has failed in a suit against a *sazawal* for rents collected by him from the tenants, he cannot afterwards sue the tenants for the same rents (*f*).

Tenants are not liable for vague and indefinite claims of *batta* on account of short-weight Rupees (*g*), as all coins are legal tender which have not lost more than two per cent. in weight, and have not been clipped or filed (*h*).

By Section 13, Act X, no under-tenant or *ryot* shall be liable to pay any higher rent for his land than the rent payable for the previous year, unless he shall have been served with a notice to that effect in or before the month of *Chyte* of the previous year (*i*).

Deposit of rent.—When the landlord and the tenant differ as to the amount of rent due for any particular period, the dispute

(*a*) S. D, 1859., 1141, but see S. D, 1857, 737.
(*b*) *Ramapat Tewari*, H. C., 21st July, 1864.
(*c*) S. D., 1861, 150.
(*d*) H. C., 5th March, 1866.
(*e*) J. *Dalrymple*, H. C., 24th April, 1862.
(*f*) *Anand Mayi Debya*, H. C., 4th February, 1865.
(*g*) Constr. 294
(*h*) Section 3, Act XVII, 1835.
(*i*) S. D., 1853, 348.

relating either to the rate or to the amount of previous payments, the tenant may deposit the amount he thinks due with the Collector. By Section 4, Act VI, 1862, B. C., the tenant must first tender this amount to the landlord at the proper place; and if it be not accepted, and a receipt in full forthwith granted, he may deposit such amount in the Collector's Court to the credit of the *zamindar*. By Section 5, the application must be made on the stamp necessary in a suit for the same amount, and the tenant must make a declaration in the form prescribed. The Collector shall grant a receipt for the amount, and issue a notice free of charge to the landlord; and on the landlord applying for the money, it shall be immediately made over to him. By Section 6, after such deposit has been made, no suit shall be brought for any rent which accrued due prior to the date of the deposit, "unless such suit be instituted within six months from the date of the service of the notice in the fifth Section of this Act mentioned." In a case in which a *putnee* was sold for the arrears of 1224 *Magh*, and the *putneedar* sued for reversal of the sale, and deposited the rents of 1225, and the sale was reversed, whereupon the *zamindar* sued for the arrears of 1224, and was met by a plea of limitation under this Section, it was held that this Section did not apply, or the landlord could not have sued within the six months, the sale then being unreversed (*a*). When the suit is for arrears at an enhanced rate after issue of notice, its object being to enhance the rent, it seems this limitation does not apply (*b*). Also it has been decided that the deposit of rents not due, or in advance, is not authorized by this Section, and can have none of the legal effects of the deposit of rents which are due (*c*).. It does not follow that a tender of rent, not followed by deposit in Court, is not to be recognized (*d*).

(*a*) *Muhammad Bushirulla*, H. C., 22nd May, 1867.

(*b*) *Ahmad Hosain*, H. C., 13th August, 1867.

(*c*) *Taramani Kunwer*, H. C., 17th December, 1866.

(*d*) S. C.

Remedies for enforcing payment—(*a*). These are suits which are applicable to all tenancies; distraint applicable only to *ryotti* tenancies; summary sale applicable only to *putnee talooks;* arrest and attachment applicable only to tenancies in estates under the direct management of Government Officers and the Court of Wards; and attachment simply, which is now only applicable when the lease expressly authorizes this arrangement.

Suit for rent.—The principal rules governing suits for rent are, of course, the same as those which govern all other suits under Act X. They are given in Chapter IX on "General Procedure;" and it will be necessary to mention in this place only those points in which rent-suits are governed by special rules.

Who may sue.—As to sharers in joint undivided estates, there are many conflicting decisions. The weight of authority seems to be in favor of the rule that such a sharer cannot sue separately for his own share of the rent (*b*). On the other hand, it is sometimes said that a sharer in an undivided joint estate, as to whose share there is no doubt or dispute, may sue separately (*c*).

(*a*) In 1793, the only summary remedy allowed was distraint under Regulation XVII, 1793, which, of course, was of no use in the case of middlemen. In a letter of the Collector of Burdwan, dated 9th January, 1794, the Raja is stated to have asked that a summary process might be provided for middlemen defaulters as well. The Raja put it to Government "whether or how it could be possible for him to discharge his engagements to Government with the punctuality the Regulations required, unless he were vested with powers as prompt to enforce payment from his tenants as Government had been pleased to authorize the use of in regard to its claims upon him." Fifth Report, 665. Summary suits were upon this allowed by Regulation XXXV, 1795, amended by Regulation VII, 1799, under which, after a summary enquiry, defaulters were arrested and imprisoned by the Civil Court. Regulation VIII, 1831, first transferred this summary jurisdiction of "*Huftum*" suits to the Collector.

(*b*) II S. R., 223; S. D., 8th January, 1861, *Hyder Ali*, S. D., 5th April, 1861, *Ramjoy Singh*, 24th April, 1866; *Muthura Nath Rae*, 11th July, 1866, *Beni Madhub Ghose*, 11th September, 1866, F. B.

(*c*) *Amrit Choudhry*, II. C., 6th May, 1864.

But if the tenant dispute the share of such a sharer who sues separately, the suit must fail (*a*). And if the *ryots* have always paid the rent to another sharer, the suit will fail (*b*). If the estate have been privately partitioned among the sharers, it would seem that each sharer may sue separately for his own share of the rents, even though, as regards Government, the liability of all the sharers be still joint and undivided (*c*). Section 108, Act X, contemplates decrees being given "in favor of a sharer" in a joint undivided estate for money due to him on account of "his share;" so it is clear such suits will lie in some cases.

By Section 55, Act XI, 1859, even after a defaulter's estate has been sold, he may sue for rent which became due before the latest day of payment. The fact that the plaintiff has ceased to be a landholder since the cause of action arose, does not debar him from bringing a suit under Act X (*d*). If a person against whom a decree of the Civil Court has been given be not ousted from possession in execution of such decree, he may sue for the rents and recover them, being, at the same time, liable to account to the decree-holder for the same (*e*). The Court should admit a plaintiff in a rent-suit on the ground of possession. It is wrong to require him to prove his title in the first instance (*f*). A person in possession is entitled to collect the rents, even though his title to the estate may be the subject of litigation elsewhere (*g*). A mere plea that the title to the estate

(*a*) S. D, 1857, 1405, *Dhurm Lall*, H. C, 8th July, 1864.

(*b*) *Joynath Nag*, H. C., 26th August, 1864. See S. D., 1853, 618.

(*c*) VII S. R., 483; S. D., 1848, 297; 1852, 871, *Muhammad*, H. C., 2nd December, 1864.

(*d*) *Muhammad Kadir*, H. C., 1st July, 1864. And the same rule applies to ejected farmers by Clause 6, Section 23, Regulation VII, 1799; *Gunga Pershad*, N. W. P., 13th January, 1862.

(*e*) *Anand Mohan Ghose*, S. D., 27th March, 1862.

(*f*) S. D., 1856, 764.

(*g*) S. D., 1854, 164.

is being litigated, is no answer to a claim for rent by a party in possession (*a*).

If the real interest in a purchase be with the plaintiff, he may sue for the rents, though the purchase may have been effected in the name of a *Farzi* (*b*). When the real title is not in dispute between the real purchaser and the *Farzi* at an auction sale for arrears, Section 27, Act I, 1845, (now Section 36, Act XI, 1859,) is no bar to a suit for rent being brought by the real purchaser (*c*).

A receiver appointed by the Supreme Court may sue for rent without a special order in each case (*d*).

A father cannot, as guardian of his infant daughter, sue for rent due to her without getting a certificate under Act XL, 1858, unless the Court expressly permits him to do so (*e*). A certificate under Act XXVII, 1860, is not necessary to enable a man to carry on the suit of a deceased plaintiff if the Court is satisfied that he is entitled to represent him (*f*).

A person to whom the *zamindar* has assigned the right to recover rents may sue under Act X (*g*).

A *thikadar*, who has transferred his rights, cannot, even by consent of the vendee, carry on a suit for rents in his own name (*h*).

Who may be sued.—In a suit for rent only the contracting parties need be made defendants (*i*), that is, only the immediate

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(*a*) S. D., 1853, 377 , S. D., 1849, 197.

(*b*) S. D., 1850, 605.

(*c*) S. D., 1858, 1733.

(*d*) S. D., 1858, 1042, 1794.

(*e*) *Rakhal Dass Mukkerjya*, H. C., 9th September, 1863.

(*f*) *Ikram Hosain*, H. C., 15th May, 1865.

(*g*) *Syama Sundari Dasya*, H. C, 4th December, 1862 , *Kissen Kumar Mitter*, 8th January, 1864, *Binod Behari Mukherjya*, 5th April, 1866, *Jaiprokash*, N. W. P , 29th February, 1864.

(*h*) S. D , 1850, 6

(*i*) S. D , 1851, 27

lessees of the plaintiff (*a*). A *durputneedar* cannot be sued for rent by the *zamindar*, as he is only liable to the *putneedar* (*b*). A *zamindar* is not bound to include as defendants sharers in under-tenures who have not executed *kabuliyats*, or registered their names (*c*). He is not bound to proceed against all persons who may have latent interests in a tenure, but against that person only who may be found in possession with a legal right, and he may sell the tenure on a decree being passed against such ostensible owner; for the landlord is not bound to look beyond his own *sheristah* (*d*). But when an unregistered transferree of a tenure had been some time in possession, he was allowed to defend a suit brought against the vendor (*e*). A landlord cannot sue the nominal and the real lessee as well, but must make his election. If he prove the nominal lessee to be an agent for an unnamed principal, he may proceed against the principal, but cannot sue the agent as well (*f*). No suit for rent will lie against an agent when the principal is present (*g*). And no suit lies against a person who is admittedly only a nominal and ostensible tenant (*h*). The Collector can decide whether a man is an ostensible or a real tenant (*i*).

A suit against a lessee, and in default against his surety, will lie under Act X (*j*). But it is not absolutely necessary to make

(*a*) S. D., 1852, 33.

(*b*) VI S. R., 183.

(*c*) S. D., 1856, 492.

(*d*) *Tilak Chunder Chuckerbutty*, H. C., 31st March, 1863 ; *Huri Churn Bose*, 30th March, 1867.

(*e*) S. D., 3rd September, 1861; See "Registration" in Chapter VI, and "Intervenors" in Chapter IX.

(*f*) *Hira Lall Bukshi*, H. C., 11th November, 1862; *Shaikh Kanya*, 27th June, 1864.

(*g*) S. D., 1851, 289.

(*h*) *Lall Mohan Sen*, H. C., 29th August, 1865.

(*i*) *Golak Chunder*, S. D., 26th June, 1862.

(*j*) *Kamarun Nissa*, S. D., 28th June, 1862 ; *Gholam Hosain*, N. W. P. 30th July, 1861.

the surety a party to the suit (*a*). When many *ryots* are liable on one *kabuliyat* each for the whole rent and for one another, all need not be made parties (*b*).

Mortgagees holding leases from the mortgagor, which reserve a rent, may be sued under Act X (*c*).

Dependent *talukdars* may be sued for rent under Act X (*d*). One old case rules that *putneedars* cannot be sued summarily (*e*). But they may unquestionably now be sued under Act X.

Rent-paying holders of *chakaran* lands may be sued (*f*).

For what demands suit will lie.—The Collector's jurisdiction extends to suits for rent in tenancies not strictly agricultural, provided the subject of the lease be land, and the rent issue from the land, and be due on account of, and for the use of, the land, whatever may be the purposes for which the surface of the land is used. Thus, when the land was leased for the erection of *golahs*, although the lease included the right to levy *golah* duties, a suit for rent due under it was held to lie in the Collectorate (*g*). But a suit for house rent is not cognizable under Act X, even though the rent include that of the land near the house (*h*). Nor is a claim for arrears of rent due on account of an Indigo Factory thus cognizable (*i*). But if the main demand be on account of the land, the existence of a house thereon does not bar the Collector's jurisdiction (*j*). Duties on

(*a*) I S. R., 238.

(*b*) S. D., 1847, 413; 1848, 543.

(*c*) *Bisha Rup Dutt*, H. C., 24th June, 1864.

(*d*) *R. Watson*, 3rd February, 1866; *Chunderkant Chuckerbutty*, H. C. 11th December, 1865, and 13th June, 1866.

(*e*) VII S. R., 171.

(*f*) S. D, 1852, 373.

(*g*) *R. Watson*, 6th April, 1864.

(*h*) *Haji Mahomed Khan*, S. D.; 28th June, 1862, *Bipra Dass Dey*, H. C. 26th November, 1864

(*i*) *Adwaita Chunder Pal*, H. C, 1st April, 1863.

(*j*) *Nasira Ali*, H. C., 5th July, 1864, *Tarini Pershad Ghose*, 9th January, 1865.

account of *ghats* and *golahs* are not recoverable under Act X (*a*). Nor rent due under a lease of canal or river tolls (*b*). But a suit for arrears of rent due on account of a market is cognizable by the Collector (*c*). A suit for a penalty, and for rent due under a lease of a fishery does not lie under Act X (*d*). A suit for money due upon a contract under which a certain sum was to be paid for one year's produce of date trees, was held not cognizable by the Collector (*e*). A claim for the value of felled timber is not cognizable (*f*). But claims for rent on account of ordinary forest rights are cognizable (*g*).

There are several rulings of the Agra Court to the effect that Act X refers only to land *khiraji* or *khalsa*, *i. e.*, land included within the limits of a settled estate, and to land held *lakhiraj*, but not to land in a town or city not falling within either of these classes (*h*). A claim for *prajawat* (*parjote*) or ground rent paid by non-cultivators for the sites of their houses is not cognizable under Act X (*i*).

Suits of the nature of those for contribution between co-sharers do not lie under Act X. When the agreement was that one sharer should pay his quota of the revenue through another, the relation of landlord and tenant was not created between them, and the amount could not be sued for as rent (*j*). A

(*a*) *J. Furlong*, II. C., 17th November, 1862.

(*b*) *H. W. Garland*, II. C., 11th August, 1864, *J. Furlong*, 15th May 1863.

(*c*) *Gyantri Debya*, H. C., 7th June, 1864.

(*d*) *Hingar Saudagar*, II. C., 21st July, 1866 (?)

(*e*) *Deb Nath Ghose*, H. C., 28th July, 1866.

(*f*) *Thakur Pandy*, N. W. P., 23rd December, 1863; *Bishandi*, 23rd February, 1864.

(*g*) *Phulloo Koeri*, N. W. P., 16th December, 1864, F. B, *e. c*; *Ram Narayan Tuti*, 1st March, 1864

(*h*) *Ganesh Ram*, N. W. P., 31st July, 1862, *Azimulla*, 17th February, 1864, *Tafazzul Hosain*, 7th March, 1865, F B.

(*i*) *Azimulla*, N. W. P., 17th February, 1864, F. B

(*j*) *Golab Chunder Rai*, S. D., 16th September, 1861.

suit by one *putneedar* against his co-sharers for his share of the rents collected by them will not lie under Act X (*a*) When sharers agreed that, at the close of the year, they would make a partition, and that, up to that time, each should pay rent for the land in his personal occupation, it was held that a suit for this amount would not lie under Act X (*b*). But in another case it was said that a sharer in a joint undivided estate holding land as a *ryot*, may be sued for the rent of it by his co-sharers (*c*). So, too, the Agra Court has held that, when in a *putneedari* estate, one sharer cultivates lands as a *ryot* in the *puttee* of another sharer, he can be sued for rent as a tenant in respect of such lands (*d*). The Calcutta Court has ruled that a suit by some of several lessors against the lessee, and the remaining lessors to recover a particular share of the rent, the whole of which had been paid to the other lessors, is a suit partly to try the lessor's rights as between themselves, and will not lie under Act X (*e*). The Agra Court, on the other hand, has decided that such a suit will lie in the Collector's Court, and should be decided according to previous receipt of the rents in the manner prescribed in Section 77 (*f*). The latter ruling seems correct, as it is not necessary to go into the question of title in order to decide such a suit. Suits for *malikana* will not lie under Act X (*g*).

In one case it was ruled that a suit for the realization of a balance of a decree under Regulation VII, 1799, which decree had been partly satisfied by the sale of the tenure, would not lie under Act X (*h*). If this ruling be correct, which seems

(*a*) *Soobhul Singh*, H. C., 17th February, 1864.
(*b*) *Amrit Chowdhry*, H. C., 20th March, 1863.
(*c*) *Guru Prosono Rai*, H. C., 26th August, 1864.
(*d*) *Honoman Dyal*, N. W. P., 21st April, 1864.
(*e*) *Ishree Pershad*, H. C., 14th March, 1864.
(*f*) *Monohur Rai*, N. W. P., 27th July, 1864.
(*g*) *Thakur Misir*, N. W. P., 31st July, 1862.
(*h*) *Mahtap Chunder*, H. C., 12th March, 1863.

questionable, balances of rent, unsatisfied by the summary sale of a *putnee taluk* under Regulation VIII, 1819, are probably not recoverable under Act X.

A suit for excess rents under a lease made in consideration of a premium, whereby the lessee was to pay the Government revenue, and reimburse himself from the surplus assets, and which provided for an annual assessment and measurement, was held to lie under Act X (*a*).

A suit for declaration of rights under cover of one for rents will not lie in the Collectorate (*b*).

In the case of arrears of rent in kind, the common practice is to sue for the selling value of the produce, with interest on that amount (*c*). But it may be observed that, under the old practice, interest on loans of grain was not allowed (*d*).

When a *zamindar* sued for a balance of rent, it was held that the circumstance of the claim also representing the loss which the plaintiff had sustained in consequence of the amount not having been paid to one of his judgment-creditors, did not oust the Collector's jurisdiction (*e*).

Suit on an *ikrarnama*, drawn in the form of a bond, but providing for the payment of rent, lies under Act X (*f*).

Limitation of rent suits.—Section 32, Act X, provides that "suits for the recovery of arrears of rent shall be instituted within three years from the last day of the Bengal year, or from the last day of the month of *Jeth* of the *Fusli* or *Willaiyati* year, in which the arrear claimed shall have become due" (*g*).

(*a*) *Sharkat Ali*, H. C., 23rd April, 1864.

(*b*) S. D., 1851, 709.

(*c*) See *Kodas Chunder Ghose*, 27th April, 1867.

(*d*) Construction, 487.

(*e*) *Subhan Ali*, N. W. P., 8th July, 1864.

(*f*) *Dhanpat Sing*, H. C., 14th May, 1867.

(*g*) The *Willaiyati* is the Orissa era, which dates from A. D. 592¾. It is not clear why *Jeyt* is made the last month of the *Fusli* year. Sections 18 and 19 make Cheyt the closing month, and so it is regarded in practice.

There is a special rule for the limitation of suits for arrears at an enhanced rent, which will be given under the head of enhancement. It has been ruled by a Full Bench of the Calcutta Court, that Act XIV, 1859, the general limitation law, does not apply to suits under Act X, and therefore that no deduction from the ordinary period can be made in cases of legal disability (*a*). No deductions whatever can be allowed in computing the three years' limitation prescribed by this Section (*b*). Any claim beyond this will be disallowed, even though the plea has not been raised by the defendant (*c*). On the other hand, the Agra Court, also by a Full Bench decision, have ruled that Act XIV, 1859, is applicable to suits under Act X (*d*). The mere fact that rent has not been paid for many years, is no bar to a suit when use and occupation are admitted (*e*). A claim is not barred by limitation, because it can only be elucidated by an account which goes back to a period beyond the statute (*f*).

Rent, it is said, is a perpetually recurring claim, which may be enforced at any time when the right is clear, however long its realization may have been neglected (*g*). But in a recent case it was decided by the Privy Council, that a suit for rent is barred by Clause 3, Section 3, Regulation II, 1805, when the defendant has been by himself, or by those under whom he claims, in peaceable possession as a *lakhirajdar* without payment of rent for sixty years

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(*a*) *J. Poulson*, H. C., 18th January, 1865, F. B.

(*b*) *Dukhina Debya*, H. C., 20th September, 1864; *J. G. Bagram*, 1st July, 1864.

(*c*) *Muhammad Bad Khan*, H. C., 11th July, 1864.

(*d*) *Husnu Uskari*, N. W. P., 14th March, 1863, F. B. It may be observed that the Calcutta decision is in accordance with the numerous precedents by which Act XIII, 1848, a special limitation law for Collector's awards, was held unaffected by the general law, S. D., 1857, 658, 1197, &c.

(*e*) *Jhaja Kunwer*, S. D., 26th June, 1862.

(*f*) *Idu Siwar*, H. C., 21st June, 1866.

(*g*) *Dhuleep Sing*, N. W. P., 10th January, 1851, *Zubur Sing*, 17th August, 1862.

before the commencement of the suit. That Clause takes away from the Courts all authority to take cognizance of any suit whatever, if the cause of action shall have arisen sixty years before the institution of the suit. It precludes all enquiry into any original defect in the title under which the possession commenced, and makes it unavailing to show that the possession commenced under a possession made null and void by Section 10, Regulation XIX, 1793. A suit of this sort is not analogous to an action to recover the later items of a long account, though the limitation law has barred the earlier items. The items of an account are independent of each other: each represents a distinct contractor a distinct debt. But the right to recover rent in such a suit, depends on a possession founded on a grant avoided by Regulation XIX, 1793, which possession has been one and entire in character throughout the whole sixty years (*a*).

A rent account is a running account to the end of the year, and hence practically very nearly four years' rents may be recovered in one suit. Suppose the suit instituted on 29th *Jeyt*, 1270, F. S. That would be within three years from the last day of *Jeyt*, 1267, F. S. So that the whole rent of 1267 would be recoverable, as well as that of 1268, 1269, and the *kists* or instalments due for the first eight months of 1270 (*b*). In one case it was said that a suit might be brought within one year from the close of enhancement proceedings for more than three years' arrears, the collection of which was suspended during those proceedings (*c*). But when the enhancement proceedings had taken the form of a declaratory action, under which a decree for the rent might have been given, this was not allowed (*d*). And it is now settled by a Full Bench decision, that no allowance can

(*a*) *Chundrabali Dibya*, Sutherland, P. C., 602, See *Burdwan Rajah's* case. IV. Moore 446.

(*b*) See *Korban Ali*, N. W. P., 25th July, 1864.

(*c*) *Jai Mani Dasya*, II. C, 9th February, 1865, See S. D., 1853, 945.

(*d*) *Hara Nath Rai*, II. C., 26th May, 1865.

be made on account of the pendency of an enhancement suit, and that a declaratory decree furnishes no fresh cause of action (*a*). And of course the pendency of an enhancement suit does not bar collection of rent at the old rate.

Plaint in rent-suits.—By Section 12, Act VI, 1862, B. C., the plaint must "specify the name of the village and estate, and of the *pergunnah* or other local division, in which the land is situate, the yearly rent of the land, the amount received on account of the year for which the claim is made, the amount of the arrear, and the time in respect of which it is alleged to be due. If the arrear is alleged to be due from any *ryot*, the plaint must also specify the quantity of land."

Under Article 11, Schedule B, Act XXVI, 1867, plaints for sums under Rs. 1,000 require a stamp of one-tenth of the amount, and for sums between Rs. 1,000 and Rs. 20,000 a stamp of one-tenth of the amount on the first Rs. 1,000, and one-twentieth on the rest.

Evidence for the plaintiff.—This will of course depend on the defence made and the issues fixed. If the defendant deny the tenancy, the *onus* of proving it lies upon the plaintiff. It is incumbent upon him to prove that the relation of landlord and tenant exists between himself and the defendant (*b*). But an admission by the defendant will shift the burden of proof. When the defendant admitted himself to be the plaintiff's tenant for a portion of the land, the *onus* of proving that he was not a tenant in respect of the remainder rested upon him (*c*). But if there are several defendants, such an admission is of course only evidence against the one who makes it (*d*). If the defen-

(*a*) *Daya Mayi Chowdhraini*, H. C., 12th September, 1866, F. B.

(*b*) *Muhammad Asir*, H. C., 31st March, 1864; *Nath Thakur*, 31st March, 1864.

(*c*) *Guru Prasad Rai*, H. C., 5th August, 1862.

(*d*) *Narain Dasya*, H. C., 12th August, 1862.

dant admits the claim, a decree must pass against him (*a*). But an agent's admission is not conclusive (*b*).

If there be a written *kabuliyat*, it must be produced, and its execution proved; for whenever the genuineness of documentary evidence is contested, the *onus* of proving it lies on the party filing it (*c*). Its execution may be proved by the evidence of the attesting witnesses, or by the testimony of other persons present at the execution, or acquainted with the hand-writing of the person who executed it, or lastly, by comparing the signature with another undisputed signature (*d*). If one of the witnesses to the execution of a document be living, he ought to be called to prove the execution, though the Court may have before it copies of the depositions of other deceased attesting witnesses (*e*). Persons unable to read and write, may be attesting witnesses (*f*). But no great weight is attached to their testimony (*g*). Strict proof is required when the deed is of an unusual kind, when its existence has been concealed and it has not been registered (*h*), and when it has been executed by a *purdah-nusheen* woman (*i*). Instruments proved to have been acknowledged by the maker, though unsigned by him, have been admitted as acknowledgments (*j*). It has been held, that a power of attorney under seal is as valid as one under signature (*k*). And probably this would apply to other documents.

There is an English rule that, when an ancient document

(*a*) S. D., 1851, 286.
(*b*) *Kali Kishwur Rai*, H. C., 24th September, 1863.
(*c*) S. D., 1847, 104; April, 1860; 1851, 245.
(*d*) Section 48, Act II, 1855.
(*e*) S. D., 1848, 136; but see II Phillips, 85.
(*f*) S. D., 1847, 488.
(*g*) S. D., 1849, 78.
(*h*) S. D., 1851, 72.
(*i*) I S. R., 257.
(*j*) 1 Moore, 461.
(*k*) *Burdwan Rajah*, H. C., 18th May, 1867.

presenting no suspicious appearances, and executed more than thirty years back, is produced from the proper custody and by the proper person, *i. e*, where it might naturally be expected to be found, formal evidence of its execution is dispensed with. But should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court to reject it, however ancient it may be (*a*). A *pottah* cannot be taken to be genuine merely from its ancient date, when there is no evidence of its early existence and publicity (*b*).

By Section 36, Act II, 1855, when the original document is out of reach of the process of the Court, it shall be lawful to the Court, on application to it, and on notice to the opposite party at a reasonable time before the hearing, to make an order for the reception of secondary evidence of its execution and contents. When a document is unstamped and inadmissible on that account, it is sometimes said that, if the transaction can be proved by other independent evidence, the existence of an unnecessary unstamped document does not invalidate the claim (*c*). But this rule can never apply to the case of unstamped *kabuliyats* if execution is disputed. In no case can oral evidence be substituted for any writing, the existence or contents of which are disputed, and which is material to the issue, and not merely a memorandum of some other fact (*d*). By Section 14, Act X, 1862, a suit based on unstamped *kabuliyats* must fail, unless the Court allow them to be stamped under Sections 15 and 17 of that Act, and this appears to be a matter entirely within the discretion of the Court (*e*). By Section 38, Act II, 1855, the

(*a*) *Guru Prasad Rai*, H. C., 5th July, 1866.

(*b*) *Alaka*, H. C., 16th September, 1864. As to the mode of proving an ancient lease by the existence of other similar leases in the same estate, see *A. Muir*, H C., 26th July, 1866.

(*c*) Constr. 292; 970, VI S. R., 303; S. D., 1847, 39; I Phillips, 435.

(*d*) Macpherson's Civil Procedure, 223, *Uma Sundari Dasya*, H. C., 2nd August, 1867

(*e*) *Gour Prasad Sing*, H. C., 2nd May, 1867.

admission of execution by the opposite party dispenses with the necessity of proving execution. But such admission is good only against the party making it. And the admission of a document by the opposite party in a former suit does not exonerate the party filing it from proving it in a latter suit (*a*).

A plaintiff is bound to prove his case as laid in his plaint. When, therefore, he sues on a *kabuliyat*, which is rejected by the Court, he cannot subsequently set up a fresh case (*b*). When this document is rejected, the suit must be dismissed, even though the defendant admit holding of the plaintiff, or the plaintiff be proved to be entitled to some rent on another ground (*c*). In claims founded on a *kabuliyat*, the only issues are the genuineness of the document, and the amount paid (*d*). A decree cannot be given on a *kabuliyat* against a tenant other than the one who executed it or his representative (*e*), even though that other be in possession of the land (*f*). But when a plaintiff, in support of the rates claimed by him, filed a *lagit*, which he failed to prove, it was held that, as this document did not constitute the basis of his claim, its rejection did not preclude a decree for lower rates (*g*). Rent cannot be decreed, or a *kabuliyat* disallowed at the suit of a third party (*h*).

As to the proof of oral or implied contracts of tenancy, evidence must be given that the defendant occupied the land under an understanding that he would pay rent for it (*i*). Proof of

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(*a*) *Pran Nath Rai*, H. C., 3rd August, 1866.

(*b*) *Nura Huri Mohun*, H. C., 26th August, 1862.

(*c*) S. D., 1853., 635, 915; *Fatima*, H. C., 23rd January, 1863; *Sannu Karigar*, 8th August, 1862.

(*d*) S. D., 1850, 360.

(*e*) S. D., 1851, 289.

(*f*) *Hurprasad*, N. W. P. 1st October, 1850; *Jaipal Sing*, N. W. P., 11th December, 1862.

(*g*) S. D., 1857, 1072.

(*h*) *Anund Nath Ghose*, S. D., 27th March, 1862.

(*i*) S. D., 1848, 626; 1852, 806; C. O. 202, 5th May, 1857.

previous payments of rent is a sufficient foundation for a rent suit (*a*). The village *jamma-wasil-baki* papers are generally considered sufficient to establish a holding and previous payments (*b*). Their genuineness must be proved by the evidence of the writer. But if it be proved that they have been destroyed, secondary evidence of their contents is admissible (*c*). But latterly the sufficiency of these papers to establish a tenancy has been questioned. The Privy Council has laid it down as a rule, that the mere production of the plaintiff's accounts is not sufficient evidence to establish a debt, unless the correctness of such accounts has been acknowledged by the debtor (*d*). In a recent case it was said that *jamma-wasil-baki* papers are a mere private memorandum made for the *zamindar's* own use and, therefore open to suspicion. Their genuineness must be proved by the writer. Proof of the genuineness of the writer's signatures is not sufficient (*e*). In another case in which it was sought to prove a varying rate of rent from those papers, the Court said:—"Such papers cannot incontestably prove variation in a *ryoti jamma*, unless it can be shown, not merely that the paper show a varying rate, but that the *ryot* has paid at a varying rate; otherwise every *ryot* would be at the mercy of the *zamindar* and his agents" (*f*). In a subsequent case it was said:—"If the original *jamma-wasil-baki* papers were produced, they might, under Section 43, Act II, 1855, perhaps be admissible as a book regularly kept in the way of business; and as such, they would be corroborative, but not independent proof of the facts stated therein." Or "the writer may be produced; and refreshing his memory from the papers under Section 45, Act II, 1855, he may be asked to

(*a*) Constr. 380, 574; S. D., 1847, 403; 1853, 571, 1857, 1252, 1859 591.

(*b*) S D., 1851, 42.

(*c*) S. D, November, 1861

(*d*) *Rai Sreekissen*, Sutherland, P C., 215.

(*e*) *Allyat*, H. C., 9th May, 1866.

(*f*) *Gopal Mandal*, H. C., 12th May, 1866.

state what rent the defendant paid; and then to corroborate his testimony, the paper may be put in under Section 43. If it be proved that the writer is dead, or cannot be found, the document may be put in as an entry made in the ordinary course of business under Section 39." And referring to the cases last cited, the Court said:—"Of course all books of accounts and entries, made by or on behalf of a party, when produced as evidence in his own favor, must be received with caution; but there seems to be no reason why a series of *jamma-wasil-baki* papers appearing to be regularly kept, should not be entitled to credit on the same principle as other contemporary records made and kept by the party producing them in the ordinary course of his business" (*a*). In the same case it was said that, except when estates were held *khas* or under attachment, entries in *kanungo's* papers as to payments of rent were probably made from mere hearsay, and such papers are therefore no evidence at all against tenants.

When the defendant pleads a rent-free holding, the *onus* is upon the landlord of proving that the land has previously paid rent (*b*). In such a case the only issue is whether rent has been previously paid or not (*c*). If the circumstances show that the defendant's occupation has been adverse, and if he has from the first refused to pay rent, the suit for rent will not lie, but the defendant must be sued for possession with mesne profits (*d*). When there has been a long continued occupancy without payment of rent, occupancy alone furnishes no ground whence a contract of tenancy can be presumed (*e*). When rent-free land has been resumed, and rates of rent assessed upon it by settle-

(*a*) *Khettra Mani Dasya*, H. C., 30th May, 1867.

(*b*) *Mati Lall Aduk*, H. C., 2nd February, 1865; *Mritonjoy Chuckerbutty*, 9th July, 1866; S. D., 1853, 365.

(*c*) *Jodi Singh*, H. C., 8th March, 1864.

(*d*) S. D., 1853, 669, 1856, 694; *Jymongal Singh*, H. C., 16th December, 1864.

(*e*) *Bonomali Surma*, H. C., 10th September, 1862.

ment, a suit for rent will lie, as the settlement is as it were a "contract of record" creating a tenancy (*a*). The landlord cannot sue for the rent of *lakhiraj* land till it has been resumed according to law (*b*); nor for the rent of resumed lands till they have been legally assessed (*c*). When the Settlement Officer wrongly included the profits of some rent-free *chakeran* land in the assets of an estate at settlement, this did not give the lessor a right to sue for the rent (*d*). It should be observed that the plea of rent-free does not, of itself, bar the Collector's jurisdiction. It must be established by proof to have that effect (*e*). And a defendant claiming to hold land rent-free must specify precisely the land that he so claims (*f*).

As to squatters and trespassers, the Agra Court has laid down that the owner of land in the occupation of another has, *primâ facie*, a right to the rent, contract or no contract (*g*.) And when Government took possession of lands for an embankment without the legal formalities and irregularly, a decree for the rent was given by the Calcutta Court (*h*). But generally a contract of tenancy must be proved just as in suits for "use and occupation" under English law (*i*). A suit for rents against a party in possession wrongfully will not lie under Act X (*j*). In another case in which the rightful tenants had been ousted, the

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(*a*) S. D., 1859, 1760.

(*b*) *Miyanat-ul-Huk*, H. C, 12th August, 1864; *Gumani Kazi*, 1st June 1683, F. B.; *Firthi Sing*, N. W. P., 26th May, 1863.

(*c*) *Debi Dutt*, H. C., 17th August, 1864.

(*d*) *Govind Dass*, H. C., 15th August, 1864.

(*e*) *Kali Singh*, H. C., 19th September, 1864; *Asrafun Nissa*, H. C., 23rd March, 1866.

(*f*) *Sutya Churn Ghosal*, H. C., 3rd August, 1865.

(*g*) *Rahi Surn Sahai*, N. W. P., 28th September, 1853; *Hukimun Nissa*, 18th May, 1854.

(*h*) *Joy Narain Bose*, H C., 6th August, 1862. See S. D, 1859, 218.

(*i*) S. D., 1853, 936, 1852, 806; Smith, p. 139, note.

(*j*) *Mujib-un-Nissa*, N. W. P., 22nd August, 1864.

trespassers were allowed to be sued for rent (*a*). Squatters may be sued for rent (*b*). And when land had accreted to a tenant's holding, and he was proved to have had the use of it, an implied contract of tenancy was presumed (*c*). A tenant holding without agreement is liable to pay a fair rate of rent (*d*).

Pleas and Evidence of Defendant.—The Sudder Court distinguished pleas as those raised "in bar of the hearing," and those "raising issues on the merits," which somewhat resembles the English division of "dilatory pleas" and "pleas in bar" (*e*). The following are the principal "pleas in bar" in the Indian range of the term.

Plea that the Collector has no jurisdiction to hear the suit.—The mere denial by the defendant that he is a tenant does not take the case at once out of the jurisdiction of the Collector. It must be established by proof to have that effect (*f*). The plea of rent-free too cannot be admitted in bar of jurisdiction, without enquiry whether it is founded on fact (*g*). The Collector may try questions of *benami* ownership (*h*); but not questions relating to rent depending on equitable rights arising from circumstances other than the relationship of landlord and tenant (*i*).

Plea of insufficient stamp, misjoinder, or multifariousness.—Distinct claims cannot be lumped up in one suit (*j*). It has been held that a single suit should be brought for the rent of

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(*a*) *Nur Ali*, N W. P., 4th June, 1864.

(*b*) *Nitya Nand Ghose*, H C., 20th June, 1864.

(*c*) S D, 1860, 240. As to transferees, See Chapter VI.

(*d*) *J. Stalkart*, H. C, 19th July, 1864

(*e*) Macpherson's Civil Procedure, 191, Stephen on Pleading, 48.

(*f*) *Hurs Prasad Mali*, H. C, 19th August, 1862, *Imam Ali Khan*, N W. P, 3rd September, 1864, F. B, *Puna Dass*, H. C., 22nd May, 1865.

(*g*) *Kali Singh*, H C, 19th, September, 1864.

(*h*) *Hira Lall Bakhshi*, H C., 11th November, 1862.

(*i*). *Prosona Kumar Pal Chowdhri*, H. C., 2nd September, 1867, F B.

(*j*) *Murad Ali*, H. C., 21st February, 1863, VII, S. R., 381, S. D., 1853, 125, 1860, 450.

separate parcels of land held under one lease (*a*). But a single suit will not lie against a number of *ryots* who do not jointly cultivate a single tenure, and are not otherwise connected than as living in the same village (*b*). Such a suit should be dismissed even though the plea be not raised (*c*). Arrears of rent for successive years are several and distinct causes of action, and need not be included in one suit (*d*). It is doubtful if Revenue Courts have the power given to Civil Courts by Section 9, Act VIII, 1859.

Plea of estoppel by matter of record.—A decree or dismissal is a bar only where the Court has thereby determined that the plaintiff had no title to the relief sought by the plaint (*e*). If a suit for the arrears of a previous year have been dismissed, a second suit for the same is barred (*f*). But the dismissal of the suit otherwise than upon the merits does not bar a second suit (*g*). Thus the dismissal of a suit against several *ryots*, on the ground of their joint liability not being proved (*h*), a dismissal for default of prosecution (*i*), and a mere withdrawal from a former suit (*j*), even if such withdrawal have been without the permission of the Court (*k*), are no bar to a subsequent suit. But a suit dismissed in the presence of the parties for want of proof is dismissed on the merits (*l*). And the Agra

(*a*) *Ajhudhya Ram*, H. C., 27th February, 1865.

(*b*) VII, S. R., August, 1842; Constr, 890; *Rambator*, N. W. P., 23rd July, 1844.

(*c*) *Gunesh Prasad*, H C, 24th June, 1864.

(*d*) *Satya Churn Ghosal*, H. C., 25th January, 1865.

(*e*) Macpherson's Civil Procedure, 50. See *Tara Prosad Rae*, H. C., 12th August, 1862.

(*f*) *Ishwar Chander Bose*, S. D., 27th March, 1862.

(*g*) *Rama Nath Rae*, H C., 12th July, 1865.

(*h*) *Tilak Dhari Sahu*, H. C., 22nd April, 1863.

(*i*) *Dhanpat Singh*, H. C., 23rd June, 1864 (?) See Section 58, Act X.

(*j*) S. D., 1858, 469.

(*k*) *Mudhusudan Mullick*, H C., 27th March, 1867.

(*l*) *Muhammad Chowdhry*, H. C., 20th December, 1864.

Court has held that a claim dismissed in a former suit, although a distinct finding regarding it may not have been recorded, is a bar to a fresh suit under Section 2, Act VIII of 1859 (*a*). A decision as to the area of land in a tenant's possession does not estop the landlord from proving that he held a larger quantity the following year (*b*). If a decree of the Civil Court be old and unexecuted or ambiguous, it does not bar the Collector's jurisdiction (*c*). A former decree does not render null a written agreement to which it makes no reference (*d*). As to whether revenue findings act as *estoppels* to civil suits, the decisions have been conflicting (*e*).

The principal "pleas raising issues on the merits" are the following:—

Plea of Payment.—The *onus* of proving this lies upon the defendant, as it is always for a debtor to show discharge of his debt (*f*). And when mere *primâ facie* evidence of payment has been given, which has been rebutted by contrary evidence, the debtor has failed to discharge himself (*g*). The ordinary mode of proving payment is by producing the landlord's or his *gomashtah's* receipt. But payment may always be proved by oral testimony, whether a receipt has been given or not (*h*), and receipts, inadmissible for want of stamp, may be looked at by a witness to refresh his memory (*i*). Receipts for rents, if sworn to by the tenant, are *primâ facie* evidence of payment; but if not sworn to, or otherwise proved, the mere absence of protest on

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(*a*) *Khurga*, N. W. P., 7th January, 1863.
(*b*) *Bhagvat Jha*, H. C., 22nd July, 1862.
(*c*) *Saya Mani Debya*, H. C., 16th December, 1864.
(*d*) *N. Pogose*, H. C., 6th December, 1864.
(*e*) *Anwar Ali*, H. C., 26th November, 1864; 26th July, 1863.
(*f*) S. D., 1847, 618; *Mahabir Singh*, H. C., 19th August, 1864.
(*g*) III Moore, 347.
(*h*) S. D., 1847, 43.
(*i*) II Phillips, 482.

the part of the landlord does not convert them into evidence (*a*). The English rule is, that whenever a material averment well pleaded is passed over by the adverse party without denial, it is thereby conclusively admitted; but the Privy Council have held, that this strict rule that averments not traversed must be taken to be admitted, is not applicable to India (*b*). The "written statement" of the defendant does not correspond to an English replication in confession and avoidance. Admission of facts by a *vakeel* are binding on the client, but not apparently admissions on matters of law (*c*). The procedure as to the attestation of receipts is laid down in the case of *Rajishwari Debya* (*d*). A tenant is entitled to summon his landlord as a witness (*e*). When one of several plaintiffs admits the receipts, such admission is not binding on the other plaintiffs (*f*). When the genuineness of a receipt is contested, the *onus* of proving it lies on the party producing it (*g*); and this being the tenant, the landlord, and not the tenant, should have the benefit of any doubts (*h*).

The law presumes the payment of all previous rent from a receipt of later date (*i*). In whatever way the landlord may keep his accounts, a receipt for rent due for subsequent periods is presumptive evidence of payment of the rent previously due (*j*). Similarly, when rent for a particular year has been sued

(*a*) *Kirthi Dass Mistri*, H C., 30th May, 1867, F. B., over-ruling *Kathyani Debya*, 11th February, 1865. See *Ram Jadu Ganguli*, H. C., 2nd December, 1867.

(*b*) *Anand Mayi*, Sutherland, P. C., 485.

(*c*) *Jashoda Kunwer*, H. C., 10th August, 1866. See Macpherson's Civil Procedure, 209.

(*d*) H. C., 11th December, 1865.

(*e*) *Supal Khan*, H. C., 21st December, 1865.

(*f*) *Unnoh*, N. W. P., 14th October, 1863.

(*g*) S. D., 1847, 104, *Rajishwari Debya*, H C, 11th December, 1865.

(*h*) *Ishwar Chunder Achajya*, H. C., 22nd August, 1864.

(*i*) Goodeve, 625.

(*j*) S. D, January, 1861.

for and decreed, a presumption arises that the rent of previous years has been paid, though of course such presumption may be rebutted by evidence to the contrary (*a*). So too, admission of payment of rent for subsequent periods is presumptive evidence of payment of rent for antecedent periods (*b*). But this presumption does not in any case arise unless the defendant distinctly alleges and pleads payment of the previous rents (*c*). The presumption also does not arise in the case of rents levied by distraint or by a *putnee* sale, since those processes only extend to the arrears of a single year (*d*).

Plea of special adjustment of rent.—As explained in an earlier part of this Chapter, rents are often discharged in peculiar ways under mutual agreement. This plea is therefore somewhat similar to the English one of "accord and satisfaction," *i. e.*, that, there has been an agreement, which agreement has been completely performed, and so there has been a total extinguishment of the original cause of action (*e*) It has been ruled that such peculiar adjustment must be specially pleaded, or the tenant will lose the benefit of it (*f*). When it was pleaded that under a mutual agreement, the rent was to be retained by the tenant in consideration of expenditure made by him for the landlord, it was held that this plea must be investigated as if proved, it would be a valid defence (*g*). The Collector may try the validity of a bond alleged to have been granted by the landlord, under which the rent is to be applied to defray the debt (*h*). A condition for such an application of the rent does not take the

(*a*) *Inaiyat Hosain*, H. C., July, 1864, *Shiva Narain Bhuttacharj*, S. D. 5th September, 1861; *Kishen Jiwan*, 21st May, 1862.

(*b*) *Surat Sundari Debya*, H. C., 5th December, 1864, *Daya Maye Chowdhrain*, 12th September, 1866.

(*c*) *Sutya Churn Ghosal*, H. C., 25th January, 1865.

(*d*) VII S. R., 348.

(*e*) Broom's Commentaries, 300, note.

(*f*) S. D., 1858, 661.

(*g*) *Jai Kunwer Dobain*, H. C., 3rd February, 1864.

(*h*) *Idem*, H. C., 8th April, 1863, S C., 21st July, 1864.

case out of the jurisdiction of the Revenue Courts (*a*). When there was an agreement that the lessee should get credit for all expenses in criminal cases connected with the farm, it was held that this would not cover expenses in an assault case between lessee and lessor (*b*).

Plea of set-off.—This plea resembles that last mentioned, in that it seeks to avoid the claim for rent, by showing that it has been satisfied otherwise than by direct payment, but differs from it in that the set-off is claimed in virtue of the general law, and not in virtue of any private agreement. It was formerly held, that no pleas of set-off could be admitted in a rent suit (*c*). In a later case it was said that the Revenue Courts are not competent to investigate pleas of set-off when the accounts, which include the items on which the set-off is claimed, have not been previously admitted by the plaintiff, or where the matter of the set-off involves enquiries beyond the restricted jurisdiction of those Courts (*d*). A plea that the lessor had appropriated the crop was held to involve good ground of set-off (*e*). So too a plea of an illegal attachment and consequent destruction of the crop (*f*). By Clause 3, Section 13, Regulation VIII, 1819, money paid by a *darputneedar* to save the *putnee* from sale may be set-off against the rent, and probably, under Section 9, Act XI of 1859, money paid by a *talukdar* to save a *zamindary* from sale for arrears may be set-off against the rent of the *taluk*. But an unliquidated debt cannot be pleaded as a set-off (*g*); nor a claim on the part of the tenant in respect of some other property (*h*).

(*a*) *Golak Nath Rae*, H. C., 16th August, 1866.

(*b*) *Ishwar Chunder Saha*, H. C., 11th July, 1864.

(*c*) S. D., 1850, 429; 1856, 316.

(*d*) *Abdul Ali*, S. D., 5th October, 1861; *Risal Rai*, N. W. P., 27th November, 1865.

(*e*) S. D., 1850, 104. See *Chuttu Nath Singh*, H. C., 28th July, 1862.

(*f*) *Ramdyal Singh*, H. C., 30th November, 1864.

(*g*) S. D., 1856, 772.

(*h*) *Parbati Churn Pal*, S. D., 11th June, 1861.

Plea of eviction by lessor or parties paramount to him.—Eviction by the landlord, or persons claiming paramount to him, such as the Government, is a good defence to a claim for rent. The cases are collected in Chapter IV under the head of "right to quiet possession." A plea of set-off, on the ground that a portion of the land has been taken up by Government for a public purpose, must be considered (*a*). As also of course must pleas of eviction by the landlord or his agents (*b*). But a plea of eviction by a stranger is no answer to a suit for rent (*c*). And an illegal attachment for future rents cannot be pleaded as an answer to a suit for previous arrears (*d*).

Plea of diluvion or deficiency of area.—These pleas, if raised, must be enquired into, and the tenant must not be referred to a suit for abatement (*e*). Plea of deficiency of area is no answer to a suit for rent, if the tenant know the land before he took the lease (*f*). On a plea of diluvion being proved, a deduction from the rent should be allowed in a rent suit (*g*). But in such a case, the whole *onus* lies on the defendant of proving what lands have diluviated, and the extent of the deduction to which he is entitled. The cases are collected under the head of "right to abatement" in Chapter IV. But a *zamindar* was held entitled to a decree for arrears at the ordinary rate, when the *tenant* had instituted a cross-suit for abatement, on the ground of deficiency of area (*h*).

Plea that plaintiff has no title.—It is a general rule that a tenant cannot deny his landlord's title (*i*). This rule has been

(*a*) *Dindyal Lall*, H. C., 19th July, 1866.
(*b*) *Ramprasad Bhakat*, H. C., 31st July, 1863.
(*c*) *Abdul Ghunni*, H. C., 23rd April, 1863.
(*d*) S. D., 1850, 85.
(*e*) *J. Savi*, H. C., 20th January, 1865.
(*f*) *H. Tripp*, H. C., 25th July, 1864.
(*g*) *Asgaruddin*, H. C., 19th June, 1863.
(*h*) *Harish Chunder Chowdhry*, H. C., 17th August, 1863.
(*i*) S. D., 1849, 384; *Purnia*, H. C., 24th June, 1864; *Mohesh Chunder Biswas*, 25th March, 1863, *Digambari Debya*, 17th May, 1865.

applied to the case of a lease granted by an agent when the principal was unnamed (*a*). But he may question the title of one who professes to derive his title from his landlord (*b*); and it has been held also, that this *estoppel* ceases on the expiration of the tenancy and restoration of possession by the tenant (*c*). The tenant, it is said, may dispute the validity of the landlord's title antecedent to his own possession, so as to avoid an intermediate assurance, or he may show the title under which he came into possession to have expired. Thus, a tenant coming in under a mortgagee is allowed to show that the mortgagor has subsequently foreclosed; and it was said in an English case, that when a tenancy is attempted to be established by mere payment of rent without any proof of an actual demise, or of the tenant having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment and show on whose behalf such rent was received (*d*). So too when a tenant has accepted a lease, or recognised a landlord through fraud or mistake, he may afterwards question the landlord's title; for it is a general principle of law that "it is always open to a party, not guilty of *laches*, to explain and render inconclusive acts done "under mistake or through misrepresentation" (*e*). Thus, when a *zamindar* granted a fictitious lease in fraud of another, the tenant having acted under some degree of compulsion, was relieved from liability under the lease (*f*). When a man gave a *kabuliyat* to a *zamindar* on the strength of a title-deed, afterwards declared to be forged, this was allowed to be pleaded in answer to a claim for rent (*g*). But such an objection must of course

(*a*) Goodeve, 547.
(*b*) *Gour Dass Byragi*, H. C., 9th January, 1867.
(*c*) S. D., 1850, 493.
(*d*) *Harvey* vs. *Francis Goodeve*, 548.
(*e*) *Per* Lord Denman in *Plevin* vs. *Brown*, Goodeve, 548.
(*f*) S. D., 1856, 774.
(*g*) S. D., 1858, 1650.

come from a person who was no party to the fraud, for no one can allege his own fraud to invalidate his own deed (*a*). When a defendant denies the plaintiff's title, it is for him to give some *primâ facie* evidence as to the grounds on which the objection is based. A mere objection is not sufficient to enable him to call on the plaintiff to prove his title (*b*). When the *zamindar* admits a person to be *putneedar*, such admission is conclusive against the *ryots* (*c*). The plaintiff's title is not of course affected by the fact of the defendant having given a *kabuliyat* to another party (*d*).

Plea denying the conditions of tenancy alleged by the landlord.—This plea is of very frequent occurrence. It has been recently settled by a Full Bench, that parol evidence is not admissible to vary or alter the terms of a written contract, in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import (*e*). But such a written contract may be varied by a subsequent verbal contract (*f*). And evidence of all the circumstances existing at the time the contract was made, of the meaning of the language used, and of the prevalent customs with reference to which the contract was made, may be freely received to clear up "latent" ambiguities (*g*). Parol evidence to contradict recitals in deeds averring the payment of consideration is usually received (*h*). The tenant has been allowed to show that the

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(*a*) *Nath Sahai*, H. C., 10th April, 1863; S. D., 26th June 1856; *Obhoy Churn Ghuttuk*, 28th December, 1859.

(*b*) *Gyaram Mundul*, H. C., 29th July, 1862.

(*c*) S. D., 1850, 499.

(*d*) S. D., 1852, 394; 1853, 641.

(*e*) *Kashinath Chuckerbutty*, H. C., 5th February, 1866, F. B. See *Ram Kumar Rae*, H. C., 25th September, 1862.

(*f*) S. C.

(*g*) *Ram Lochan Saha*, 12th February, 1867.

(*h*) *Chowdhry Debi Pershad*, Sutherland, P. C., 161; III Moore, 347; *Dukha Thakur*, H. C., 25th April, 1867.

land was really leased for an illegal purpose, and this being proved, has been relieved from the claim for rent (*a*). If the tenant sets up a *pottah* in disproof of the rate claimed by his landlord, the *onus* of proving it lies on him (*b*). By Clause 1, Section 9, Regulation VII, 1822, "all decisions on the demands of the *zamindars* shall be regulated by the rates of rent and mode of payment ascertained at the settlement and recorded in the Collector's proceedings, until distinctly altered by mutual agreement, or after full investigation, in a regular suit." But the Agra Court has repeatedly held that the settlement *jummabundi* may be impeached (*c*).

Plea of tender and payment into Court.—This is a plea of confession and satisfaction by matter subsequent to the commencement of the suit (*d*). By Section 7, Act VI, 1862, B. C., the defendant, if he have previously tendered the rent to the plaintiff, may pay it into Court; and if the plaintiff recover no larger amount in the suit, he will be liable for all costs; but if a larger sum be decreed, the defendant will be liable. Evidence of previous tender must be given (*e*). By Section 75, Act X of 1859, no interest shall be allowed on any such deposit from the date of payment, whether it be in full of the claim, or only in part. By Section 8, Act VI, 1862, B. C., the defendant may, without having made a previous tender, pay the amount due with costs into Court, and the costs of the suit will be regulated by the result.

The general rules as to all pleas are, that the defendant cannot shift from one plea to another (*f*). And generally speaking, no

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(*a*) S. D., 1846, 104, 1856, 124.

(*b*) *Chundrabali*, II. C., 23rd June, 1864.

(*c*) *Dindyal*, N. W. P., 3rd April, 1860, F. B., *Uchoor Pandy*, 8th December, 1863; *Gopal Doobey*, 12th March, 1863, F. B., *Mehnda Lall*, 20th February, 18 3.

(*d*) Stephen on Pleading, 252.

(*e*) See S. D., 1852, 1078.

(*f*) S D., 1856, 728.

decision can be given on pleas not pleaded (*a*). But if the claim of the plaintiff be clearly illegal, it must be rejected, even though the illegality be not pleaded (*b*). The law, it is said, is a subject supposed to be known to the Court itself, and therefore the Court must decide according to its own knowledge of the law, and must not decide against a party who really has the law on his side, merely because his pleader has failed to point out the true application of the law to the facts (*c*).

Decree in rent suits.—It is erroneous to award rents on account of other years than those on account of which a suit is brought (*d*). The decree should declare the precise amount due, and not leave it to be ascertained in execution (*e*). A manifest error, such as making costs payable by the winning party, may be amended by the Court (*f*). Interest is usually given on the total amount decreed from date of decree to date of realization (*g*). By Section 6, Regulation XV, 1793, the interest could not exceed the principal; but all such restrictions have been rescinded by Act XXVIII of 1855. The decree should not direct in what mode execution is to be made (*h*). Effect must be given to a decree at once without waiting to see the result of the appeal (*i*). By Section 3, Act VI of 1862, B. C., if the suit have been instituted without reasonable or probable cause, or if the defendant, before institution of suit, have deposited the full amount due, the Court may award compen-

(*a*) *Sufi*, H. C., 30th July, 1862, *Ishur Chunder Ghoral*, H. C, 20th August, 1864.

(*b*) Macpherson's Civil Procedure, 295.

(*c*) *Sumbhu Chunder*, III Knapp, P. C., 55, Sutherland, P. C., 25. See cases under "limitation of rent suits."

(*d*) V. S. R, 143.

(*e*) S. D, 1850, 118.

(*f*) R. S. C., 14th July, 1841.

(*g*) Constr., 715, 1095.

(*h*) *Syama Churn Chuckerbutty*, H. C., 4th August, 1862.

(*i*) *G. Gregory*, H. C., 8th July, 1864

sation to the defendant to an amount not exceeding 25 per cent. on the claim.

Distraint.—By Section 112, Act X, the produce of the land is held to be hypothecated for the rent payable in respect thereof, and the landlord is entitled to distrain for arrears of rent, [illegible] shares in an undivided joint estate may only distrain through a general manager. By Section 114, *Sarbarakars* and managers of *khas* and wards' estates may distrain, as also their *naibs* and *gomashtas*, when expressly authorized by power of attorney in that behalf. Under Section 120, servants may also distrain when authorized by written authority on plain paper. Proprietors may distrain even though there may be an unexecuted decree adverse to them (*a*).

By Section 112, when a *ryot* has given security for the payment of his rent, distraint cannot be made. By Section 113, distraint cannot be made for any arrear which has been due more than a year, nor for recovery of enhanced rent if a *kabuliyat* has not been executed (*b*). The process is not barred by the fact that the *ryot* has executed a *kabuliyat* (*c*). Rent can only be levied in this way when the defaulter is an actual cultivator (*d*). If there be a dispute as to who is the actual cultivator, this must be settled previously (*e*). By Section 115, crops, when standing, and when reaped and deposited in a threshing-floor, may be distrained, but not when they have been stored; and no property other than crops, and no crops other than the produce of the land for which the rent is due, or of land held under the same engagement, are liable to distraint.

Procedure in distraining.—A written demand of the amount due, together with an account showing the grounds on which

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(*a*) *Jagarnath*, N. W. P., 29th May, 1862.
(*b*) *Jaggat Singh*, N. W. P., 21st January, 1863.
(*c*) S. D., 1858, 648.
(*d*) *Mohini Dasya*, H. C., 1st June, 1864.
(*e*) *Rai Chander Surma*, H. C., 27th June, 1866.

the demand is made, shall be served on the defaulter, or affixed to his house (Section 116). Without this distraint is illegal (*a*). If the amount be not paid forthwith, distraint may be made of property proportionate to the arrear, a list thereof being served on the defaulter, or affixed to his house (Section 117). Distrained property may be reaped and stored by the defaulter, or, on his neglecting to do so, by the distrainer, who, in either case, is to appoint a custodian. Products which do not admit of being stored may be sold before they are gathered; but in such case distraint must be made at least twenty days before the time they are ready for gathering (Section 118). No person can be made to take charge of distrained property against his will. But if a person voluntarily take charge of the property, he is bound to take as much care of it as a man of ordinary prudence would take of his own goods under similar circumstances (*b*). After voluntarily taking charge of the property, if he neglects it, a regular suit for damages will lie against him; but he cannot be dealt with summarily (*c*). If no one will take charge, it seems the distrainer is liable for the safe custody of the property (*d*). By Section 119, if distraint be resisted, application may be made to the Collector by the distrainer or his authorized agent for aid. And the Collector may depute a single *peon* to his assistance, who, however, is not to use force (*e*). Assistance should be refused when the claim is on the face of it illegal (*f*). Distraint is to be at once withdrawn if the arrear with all expenses be paid (Section 121).

(*a*) S. D., 1850, 342.

(*b*) Section 144, Draft Contract Act.

(*c*) Constr., 958. This agrees with the English rule that a gratuitous bailee is liable for "misfeasance," but not for "nonfeasance." See *Coggs vs. Bernard*, 1 Smith L. C., 47.

(*d*) S. D., 1853, 201

(*e*) Board's Rules, Clause XVI, Section VI, 2. The application requires an eight anna Stamp, Section I, Clause 3.

(*f*) Board's Rules, Clause XVI, Section VI, Clause 3.

Application for sale.—Within five days of the time of storing any distrained crops, or if the crops do not admit of being stored, within five days of making the distress, the distrainer shall apply for sale to the Civil Court *Amin* (Section 122). This application must be in writing, and must give a list of the property, the name and residence of the defaulter, the amount due, the date of distress, the place where the property is deposited, and together with the application must be presented the costs of serving notice on the defaulter (Section 123). The *Amin* shall send a copy to the Collector, and shall serve a notice on the defaulter requiring him to pay the amount, or sue to contest the demand within fifteen days; he shall also send to the Collector a proclamation describing the property, and fixing a day for the sale, which shall be not more than twenty days from the date of the application, and fix up a copy of this proclamation at the place of sale (Section 124).

Sale Procedure.—By Section 128, if the demand remain unpaid, and if institution of a suit to contest it be not certified to the *Amin*, he shall proceed to sell the property on the day fixed. If institution of suit should not be certified to the *Amin*, it would seem that the sale made by him would hold good under this Section, though it was otherwise under the old Procedure (*a*). By Section 129, sale shall be held at the place where the property is deposited, or at the nearest *bazar*. If the arrear be satisfied by the sale of a portion of the property, the distress must be withdrawn. By Section 130, if a fair price be not offered, the sale may be postponed to the next day, or to the next market day, if a market be held at the place of sale; but only one such postponement is allowed. The price must be paid at the time of sale, or as soon after as the *Amin* thinks necessary, and in default of payment the property shall be put up again. A certificate of payment is to be given to the purchaser (Section 131). One *anna per rupee* of the purchase-

(*a*) S. D., 1854, 148.

money is to be paid to Government, and then the expenses of distress and serving notices, and the arrear with interest are to be paid to the distrainer (Section 132). If there be any balance, it is to be paid to the defaulter. *Amins* holding sales may not purchase (Section 133). They must report all irregularities; and if the notices have not been served, the sale must be postponed, and report made to the Collector (Section 133). By Section 135, when an *Amin* proceeds to the place of sale, and no sale is held, the fee of one *anna per rupee* is leviable, and shall be calculated on the estimated value of the distrained property. It is never to exceed Rupees 10. If the arrear be not paid till the day of sale, the charge shall be paid by the defaulter, and may be recovered by sale of the property. In all other cases it is payable by the distrainer, and may be recovered by sale of his property under the Collector's warrant. By Section 136, the *Amin's* proceedings under this Act are subject to the Collector's revision (*a*).

Suits regarding distraint are, under Clause 7, Section 23, cognizable only by the Collector. They are of five kinds:—

I.—Suit by the alleged defaulter to contest the demand. These suits may be instituted either upon receipt of the *Amin's* notice of sale (Section 125), or immediately after the distraint, and before receipt of notice of sale (Section 126). In either case the Collector shall send a certificate of the institution of such suit to the *Amin*, who shall suspend proceedings. By Section 127, if the defaulter execute a bond with security to pay whatever sum may be decreed, on the distrainer being served with notice of this, he shall release the property. These bonds must be on an eight-anna stamp (*b*). They must be executed or acknowledged before the Collector, this being noted

(*a*) The forms of *Amin's* returns are given in Board's Rules, Chapter XVI, Section IV, Clause 13.

(*b*) Board's Rules, Chapter XVI, Section I, Clause 8.

on the bond Property need not be pledged; the security of a person of substance is enough If objection is taken to the security, its sufficiency should be enquired into. Such bonds need not be registered (*a*). By Section 138, "in all suits instituted to contest the demand of a distrainer, the distrainer shall be required to prove the arrear in the same manner as if he had himself brought a suit for the amount." But in one case in which the rate of rent was disputed, the Sudder Court ruled that the burden of proof rested on the *ryot* plaintiff (*b*). If the arrear be found to be due, a decree shall be given in favor of the distrainer; and by Section 137, if the property has not been released, the Collector shall authorize the *Amin* to sell it, and on the distrainer presenting an application for sale within five days from receipt on the Collector's order, the *Amin* shall issue a second proclamation of sale, fixing a day not less than five or more than ten days distant, and unless the arrear with all costs of distress be paid up, he shall sell the property on such day. By Section 138, if any balance remain due after such sale, execution may be taken out against the person and other property of the defaulter. If the property have been released on security, execution may be taken out against the person and property of the surety. If, on the other hand, the distraint be adjudged vexatious and groundless, the Collector may award damages to the plaintiff. An Appellate Court may decide whether the Lower Court has rightly exercised its discretion in assessing damages under this Section. The appeal lies to the

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(*a*) Board's Rules, Chapter XVI, Section XI, Clause 7.

(*b*) *Khuda Baksh*, S D, 12th June, 1862. The correctness of this decision has been questioned. The report of it is so brief as to afford but scanty information as to the facts. In support of the ruling, it may be observed that cases may be put in which the *onus* of proving a lower rate would unquestionably fall on the tenant in a rent suit, for instance, if suit was brought on an admitted *kabuliyat*, and the tenant set up a subsequent written or oral engagement at a lower rate.

Judge or the Collector, according as the damages awarded are over or under Rupees 100 (*a*).

II.—Suit by a person other than the alleged defaulter, on the ground that the distrained property belongs to him. By Section 139, the property may be released on security being given, and if the claim be decreed, damages may be awarded. But, as before stated, under the head of the 'landlord's lien,' the landlord's claim takes priority of all others. This prior claim probably extends only to one year's arrears, that being the amount which, by Section 113, is recoverable by the distraint process. In either of the above classes of suits, when a third party claims to be landlord to the defaulter, he is to be made a party to the suit, and the suit is to be decided according to the previous receipt of the rent (Section 140). But such decision shall not affect the right of either party, who may have a legal title to the rent of the land, to establish his title by suit in the Civil Court if instituted within one year from the date of the decision. If a Deputy Collector decide the original case, and an appeal be made to the Collector, limitation runs from the date of decision in appeal (*b*). Suit by a person other than the alleged defaulter, on the ground that the property belongs to him, may be also brought for damages after the sale, if he have been prevented from bringing suit before (Section 141). In this case suit must be brought within three months from the occurrence of the cause of action (Section 144.)

III.—Suit for damages on account of an informal distraint, or on account of loss or damage to the property (Section 142), will lie if brought within the same limitation. By Section 114, if any *naib* or *gomashta* commits any illegal act under color of the exercise of the power of distraint conferred on him by power of attorney, the person employing him shall be liable, as well as the *naib* himself, for any damages accruing by reason of such act.

(*a*) *Kali Mohun Rai*, II. C., 13th February, 1863.

(*b*) *Guru Dass Ganguli*, II. C., 20th December, 1866.

When a landlord distrained upon an under-tenant of his own tenant, and committed other irregularities, it was said that as these acts were done in the exercise of the power of distraint, the suit lay under this Section. It cannot be necessary in such a suit to show that the distrainer was justified by the distraint law in all that he did, for in that case no suit at all would lie against him (*a*). A Collector cannot summarily quash a distraint sale (*b*). *Ryots* whose crops have been seized in collusive distraint proceedings, may also sue in the Civil Courts (*c*). Any tort not expressly described in these Sections can be remedied only in the Civil Court (*d*), as was the practice formerly (*e*).

IV.—Suit for damages on account of a distraint made by a person not empowered to distrain by Sections 112 and 114, nor employed for the purpose under a written authority by a person so empowered (Section 143). Such suits must be brought within three months from the occurrence of the cause of action (Section 144); and it has been ruled that the cause of action lasts as long as the illegal act lasts, and limitation begins to run from the date of its cessation (*f*). When a *naib* or *gomashta* distrains without the express authority required by Section 114, he does an act beyond the scope of his authority, and therefore he alone is liable to damages. But if the *zamindar* authorized the distress, or ratified the act by receiving the proceeds, he would be liable as well (*g*). A suit under this Section will not lie unless the relation of landlord and tenant exists between the parties (*h*).

As to the measure of the damages, the old rule was that they

(*a*) *Nundaza*, H. C., 29th January, 1863.

(*b*) S. D, 1853, 909.

(*c*) *Gopi Nath Dutt*, H. C., 19th June, 1866.

(*d*) *Gharibulla*, H. C., 17th January, 1867.

(*e*) *Muhammad Mannu*, H. C., 7th August, 1862.

(*f*) *Hiraman Singh*, H. C., 5th May, 1863; *Tarinichurn Bose*, 11th July, 1865.

(*g*) *Kali Mohun Rai*, H. C, 13th February, 1863. See 1 S. R, 229.

(*h*) *Raghu Nath Sahai*, H. C., 26th August, 1864.

should always be assessed at twice the actual value of the property distrained (*a*), without reference to the amount obtained at the sale (*b*). But probably under the present law the damages should be assessed according to the peculiar circumstances of each case, and with reference to the exact amount of injury sustained (*c*). Possibly, however, if the distraint were shown to be malicious as well as groundless, it might be allowable to award exemplary or penal damages.

V.—Complaints of resistance of distraint shall be heard if made within fifteen days of the occurrence. Such complaints must be made by the distrainer or his agent. No action can be taken on a *peon's* report (*d*). On complaint being made, a warrant is to be issued for the offender's arrest. If he be the defaulter, he may be imprisoned for six months, or till the arrear and all expenses be sooner paid or levied by distress and sale of his property. If he be a stranger, he shall make good to the distrainer the value of the property, and shall be liable to fine of Rupees 100, or in default to two months' imprisonment (Section 145). By Section 18, Act VI, 1862, B. C., a person thus arrested may be required to give security, pending the trial of the case, and in default may be committed to the Civil Jail. Cases of resistance involving actual breaches of the peace should be sent to the Magistrate (*e*).

Summary sale.—The process of summary sale is only applicable to *putnee taluks* and others of a similar nature which have been granted on this express condition. The power of bringing a *taluk* to sale summarily can only be exercised by proprietors under direct engagements with Government.

(*a*) Constr. 327.

(*b*) S. D., 1857, 1440.

(*c*) See *Rasmani Debya*, H. C., 22nd April, 1863.

(*d*) Board's Rules, Chapter XVI, Section VI, Clause 4. An eight-anna stamp is required for these applications, Section 1, Clause 3.

(*e*) Constr., 615.

A *putneedar* cannot exercise it, nor can it be delegated to a farmer (*a*).

Jurisdiction.—By Section 3, Act VIII, 1865, B. C., the sale is to be conducted by the Collector of Land Revenue in whose jurisdiction, as defined by Act VI, 1853, the *taluk* lies, and all acts preparatory to, or connected with, the sale are to be performed by the Collector (*b*). By Section 1 of that Act, when the *taluk* lies in two Collectorates, the sale is to take place in the one wherein the greater part lies. By Section 3, the word "Collectorate means the *zillah*, and no lands situated beyond the limits of a *zillah* shall be deemed to lie within such Collectorate, by reason of their forming part of an estate paying revenue to the Collector thereof (*c*). By Sections 4, 7, "independent Deputy Collectors" are to exercise all the powers of Collectors. It has been ruled that Covenanted Deputy Collectors may conduct sales, and also Assistants with full or special powers, when specially empowered by the Commissioner (*d*). Deputy Collectors, under Regulation IX, 1833, also must be specially authorized before they can hold sales (*e*)

Application for sale may be made either on 1st *Bysakh* or on 1st *Kartick*, or if those dates fall on a holiday, on the first open day (*f*). By Section 8, Regulation VIII, 1819, on these dates the *zamindar* may present a petition to the Collector, specifying the balances due from his *putneedars* on account of the previous

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(*a*) Clause 1, Section 8, Regulation VIII, 1819; Constr. 461, 523, 531. A proposal was made in 1838 to extend the summary sale process to all *taluks*. See R. B., 17, May 30th, 1838.

(*b*) See Sections 16 to18, Regulation VII, 1832, (now rescinded by Act X, 1861,) and S. D., 1850, 194.

(*c*) See *Kali Kumar Mukherjya*, H. C., 15th January, 1866.

(*d*) Summary Suit Series, 35.

(*e*) R. B., 24th June, 1849; Precedent 2, 1851.

(*f*) Board's Rules, Chapter XVI, Section 10, Clause 2, Constr. 329. Formerly a petition to the Civil Court was required besides, but this was abolished by Act XXIII, 1850.

year, or the previous six months, as the case may be. This petition is to be stuck up in the *Cutcherry*, with a notice that if the balance be not paid before 1st *Jeyt* or 1st *Aughan* (as the case may be) the *taluks* of the defaulters will be sold The *zamindar* must stick up a similar notice at his own *Cutcherry*, and at the defaulter's *Cutcherry* or village The *Mofussil* notice is to be served by a single *peon*, who shall bring back the receipt of the defaulter or his manager (*a*), or of three respectable neighbours, or the certificate of the nearest *Moonsiff* or *Thannadar*. If the notice has been served before 15th *Bysakh* (or *Karţick*), the sale may be held. At the mid-year sale the defaulter may avert the sale by paying up so much of the balance as reduces the arrear, including any intermediate demand for the month of *Kartick*, to less than one-fourth of the total amount due from 1st *Bysakh* to 30th *Kartick*.

Procedure at the sale.—By Section 10, Regulation VIII, 1819, at the time of sale the notice is to be taken down, and the lots called up in order. The *zamindar's* agent must produce an account of all payments made up to the date of sale, and receipts for the notices served in the *Mofussil*. A *rubakari* must be drawn up, stating that the existence of a balance has been ascertained from inspection of the accounts, and that the receipts for the *Mofussil* notices have been read. At the mid-year sale, the proportion of the balance to the entire demand must also be ascertained and recorded. One *rubakari* for each lot is sufficient (*b*). "The *zamindar* is exclusively responsible for the correctness and authenticity of the papers to be thus exhibited, nor shall the public officer making the sale be answerable in any respect, except for its fairness and publicity, and for the observance of the rules prescribed for his guidance in this Regulation." Alteration of date on the face of the sale notice is immaterial,

(*a*) See S., 1849, 371.
(*b*) S D., 1859, 1198.

if there be no ground to suspect fraud (*a*) By Section 9, sale must be made in open *Cutcherry* to the highest bidder, the actual defaulter alone not being allowed to bid either in his own name or in that of another (*b*). A *durputneedar*, not being in arrear with his own rent, may purchase (*c*). Fifteen per cent of the purchase-money must be paid within two hours, or the lot will be re-sold on the same day; but the entire amount of purchase-money cannot be demanded at once (*d*). The entire amount must be paid by noon of the eighth day from the day of sale, otherwise notice will be given in the *Sudder* Station, and the lot re-sold on the ninth day. In such case the defaulting purchaser will forfeit his deposit, and will also be liable for any difference between the amount bid by him and that realized at the second sale. This amount may be levied by the process of execution of civil decrees. The deposit is forfeited, even if there be no second sale (*e*). It was formerly the rule that forfeited deposits should be added to the proceeds of the sale; but, under Act XXV, 1850, they are now to be applied in the first instance to defray the expenses of the sale, and the surplus is to be forfeited to Government When the deposit has once become forfeited, it is illegal to allow it to be re-credited to the defaulter, though it has been held that this forms no ground for reversing the sale (*f*). A defaulting bidder cannot sue for reversal of the subsequent sale (*g*). A defaulting bidder cannot of course be sued for rent (*h*).

Sections 11 to 13, Regulation VIII, 1819, lay down the rule that the sale cancels all under-tenures and leases granted by the defaul-

(*a*) S D, 1853, 52.
(*b*) S. D., 1850, 89.
(*c*) VII S. R, 153.
(*d*) S D, 1850, 467.
(*e*) S D, 1854, 420.
(*f*) S. D, July, 1860, 42
(*g*) S D., 1851, 211
(*h*) S D., 1857, 232.

ter, and allow *durputneedar* the option of staying the sale by payment of the arrear. These Sections are given in Chapter V.

Summary investigation and staying sale.—By Clause 2, Section 14, a *putneedar* served with notice of sale may apply for a summary investigation at any time within the period of notice (*a*), and on this the *zamindar* shall be called on to give proof as soon as possible. If the suit cannot be decided before the day of sale, the sale must be held on the fixed day, if the *zamindar* insists upon it; "nor shall it be stayed, or the summary suit be allowed to proceed, unless the amount claimed be lodged by the *talukdar* contesting the demand." In order to stay the sale, *putneedars* who have not contested the demand summarily must pay the amount before the day of sale; but, according to the Board, *putneedars* who have so contested the demand may lodge the amount, even after the lot has been put up (*b*). But, on the other hand, it was ruled by the Sudder Court that the Collector is not authorized, either by Section 14 or by *Construction* 580, in receiving an arrear from a defaulter after a lot has been called up, and stopping the sale against the will of the *zamindar*, as the words in the *Construction*, "if the balance be not previously paid by the defaulter," refer to payments made to the *zamindar* (*c*). An application by the *zamindar's* agent to postpone a sale cannot be taken as an admission that the arrear has been paid (*d*). Payment of certain quotas of the rent by unrecorded sharers of the defaulter is no ground for staying sale (*e*). Nor is an attachment of the *taluk* by a Civil Court such a ground (*f*).

(*a*) Under Section 3, Act VIII, 1865, B. C., this investigation is held by the Collector. See Regulation VIII, 1831.

(*b*) Board's Rules, Chapter XVI, Section X, Clause 3, Precedent 1, 1849.

(*c*) S. D., July, 1860, 43. See S. D., 1856, 733, 1859, 521; Clause 1, Section 14, Regulation VIII, 1819.

(*d*) S. D., 1857, 852.

(*e*) IV S. R., 295.

(*f*) *Ram Kumar Banerjya*, 20th September, 1814, R S C., 61.

Regular Suit to reverse sale.—By Clause 1, Section 14, any party wishing to contest the right of the *zamindar* to sell, whether on the ground of there having been no balance due, or on any other ground, may sue the *zamindar* for reversal of the sale. The purchaser is to be made a party to such suits; and if the sale be reversed, he is to be indemnified for his loss at the cost of the *zamindar*. When the sale is sought to be set aside on the ground of irregularities in conducting it, it has been ruled that the Collector should be made a party to the suit (*a*). Tenants of a defaulter may sue to reverse a sale (*b*), even if in arrear (*c*). The Civil Courts cannot annul Collectors' sales by a summary order (*d*).

Giving Possession.—By Section 15, when the purchase-money is paid, the Collector will grant a certificate of payment, and the purchaser, on furnishing security, if required, is entitled to claim registration of his name in the *zemindari sheristá* without fee (*e*), and to obtain an *amul dustak* or order for possession. If there be delay, the Collector may put the purchaser in possession. If the defaulter offer resistance, the Collector will issue a proclamation to the *ryots*, warning them to pay rent to no one but the purchaser, and the aid of the Police may be called for. If the *zamindar* refuses to give possession on account of defective security, the Collector may decide the matter. The acceptance by the Collector of the security offered by the purchaser is sufficient to entitle him to possession. *Hazir zamini* and a

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(*a*) S. D., 1850, 179. This ruling is questionable, inasmuch as Clause 2, Section 16, Regulation VII, 1832, the law which first empowered Collectors to hold *putnee* sales, expressly extended to those sales the provisions of Section 23, Regulation VII, 1822, one of these provisions being that it shall not be necessary to make Collectors parties to suits brought to reverse their orders.

(*b*) V Moore, 447.

(*c*) S. D., 1857, 920.

(*d*) II S. R., 284.

(*e*) Section 5, Regulation VIII, 1819.

kabuliyat are not required besides (*a*). A purchaser kept out of possession for default of security is entitled to an account of the collections made by the *zamindar* (*b*). When a defaulter had contravened the law by purchasing his own *taluk* in the name of another, he was not allowed to oppose possession being given to the *farzi* (*c*).

Disposal of purchase-money.—By Section 17, out of the proceeds one *per cent.* is to be credited to Government; next the arrear due is to be satisfied with costs and interest, provided, however, that no former balances, beyond those of the current year, (or of that immediately expired, if the sale be at the commencement of the year,) shall be recovered in this manner, as such antecedent balances have become mere personal debts of the defaulter, and the balance is to be held in deposit for two months to answer the claims of *durputnedars* who may sue for damages, if they are not in arrear with their own rent (*d*). On the expiration of two months from the date of sale, without any claims being preferred, the balance may be paid to the defaulter. Securities may be substituted for cash.

Sale of putnee taluks after decree.—By Section 2, Regulation I, 1820, sales in these cases are to be held in the same manner, ten days' notice being given of the day of sale, by notice to be stuck up in the Civil Court and the Collector's Office. By Section 8, Act VI, 1853, in independent Deputy Collectorates like Fureedpore, where there is no Judge's Court, this notice should be stuck up in the highest local Civil Court (*e*). By Section 2, Regulation I, 1820, the provisions of Sections 9, 11, 13, 15, and 17, Regulation VIII, 1819, apply to such sales.

Arrest and Attachment.—By Sections 25 and 26, Regulation

(*a*) S. D., 1855, 103.

(*b*) *Barbara Renny*, H. C., 6th November, 1862.

(*c*) S. D., 1859, 267. See S. D., 26th December, 1826.

(*d*) VII S. R., 154, *Madhub Bimod Mitter*, H. C., 10th April, 1866.

(*e*) S. D., 1853, 350.

VII, 1799, whenever lands are attached, or become subject to a *khas* collection on the part of Government or the Court of Wards under any Regulation authorizing the same, or by any means come under the immediate management of the officers of Government, so that the rents are collected by them from the *ryots*, *jotedars*, dependent *talukdars*, under-farmers, or other description of under-tenants, the Collector, in addition to the powers vested in him by Section 19 of this Regulation, is authorized, without any previous application to the Civil Court, to proceed against defaulters, of whatever denomination, in the same manner as, by Section 23, he is authorized to proceed against Sudder farmers, if he shall consider the mode of payment more likely to be effectual in causing payment of the arrear. This power, however, has for the present been withdrawn by the Board's Circular of 10th February, 1868.

This procedure is as follows:—Under Section 3, Regulation XIV, 1793, a written demand, signed by the Collector and *Sheristadar*, is served on the defaulter by a single *peon*. The amount of the *peon's* fee is to be endorsed on the demand, and paid by the defaulter. If the defaulter or his *naib* be absent, or refuse to give a receipt, the notice is to be fixed up on his house. Under Clause 2, Section 23, Regulation VII, 1799, if there be reason to suppose the defaulter will abscond, or if notice of demand have been served on him without effect, the Collector is to issue a *dastak*, and have the defaulter and his surety arrested by two *peons*, who are to convey them to the Civil Jail, and the Collector is then to apply to the Civil Court for an order of confinement. But if the defaulter show any disposition to pay the arrear, he may be kept in the *peon's* custody for ten days, or even longer. By Section 25, the Collector, before he delivers over the parties to the Civil Court, is to satisfy himself that the arrear is justly due, and he may keep the defaulter in charge of the *peon* during the enquiry that may be necessary for this purpose, though the period should exceed ten days. By Clause 3, Section 23, Regulation VII, 1799, public proclamation of attachment is to

be made, and an *Amin* is at once to be deputed to collect the rents, but he is to be at once withdrawn on payment of the arrear *Putwarries* and defaulters must furnish accounts,—collusive engagements may be set aside,—and no credit will be given to the under-tenants for any rents which they have paid to the defaulter after issue of attachment notice, or in anticipation of the usual *kists*. This rule as to anticipation of rents apparently applies only to estates attached under this Regulation, as in ordinary cases it is quite legal for landlords to anticipate their rents (*a*); and it was held not to apply to a case in which the defaulter had made a voluntary assignment of his future rents in liquidation of a loan from the tenant (*b*). By Clauses 5 and 8, the tenure in arrear and other property may be sold; and by Clause 6, the defaulter's lease may be cancelled from the commencement of the following year, or the defaulter and his surety may be compelled to perform the conditions for the full term. Under this Clause, under-tenures in estates under *khas* management may be sold summarily without a previous decree (*c*). An appeal lies to the Commissioner only if preferred on the ground of irrelevancy of the law (*d*). By Clause 7, arrests are not to be made when the occurrence of the arrear is due to drought or inundation. By Section 48, Regulation XIV, 1793, joint proprietors, who have appointed a manager, and females are exempt from arrest. And by Section 29, Act X, any defaulting under-tenant or *ryot* who is proceeded against under Regulation VII, 1799, may contest the demand by suit in the Civil Court.

Attachment by Sazawal.—By Section 18, Regulation VIII, 1819, landlords could attach a defaulter's tenure, and collect the rents through a *sazawal*. The conditions precedent to the appoint-

(*a*) S. D., 1852, 407; *Attapar Mouza*, H. C., 21st August, 1862.

(*b*) S. D., 1856, 589.

(*c*) S. D., 1858, 625.

(*d*) Board's Rules, Chapter XVI, Section 11, Clause 2.

ment of a *sazawal* were that the arrear should have been due one month before attachment, and that a summary suit should have been instituted (*a*). But this Section was repealed by Act X, and consequently *sazawals* can now be appointed only when there is an express agreement to that effect in the lease (*b*).

II.—RIGHT OF ENHANCEMENT AND MODE OF ENFORCING IT.

The existence of a body of rules as to enhancement is a necessary consequence of the existence of statutory tenures, under which tenants possess the right of holding in perpetuity at "fair and equitable" rents, for, whenever there is a dispute as to what is a "fair and equitable" rent, the matter must necessarily be settled by the Courts Suits for enhancement and abatement thus belong to the class of suits for declaration of rights (*c*).

Who may enhance?—All landlords in possession, whether ordinary *zamindars* or auction-purchasers, and whether proprietors or middlemen, have the right of enhancing rent in all cases in which enhancement is not barred by law or special contract (*d*). The only difference between auction-purchasers and ordinary *zamindars* is that the former have a larger field for their enhancement operations As regards the measure of enhancement, auction-purchasers are in the same position as other landlords. What is "fair and equitable" for the one is "fair and equitable" for the other (*e*). Section 52, Act XI, 1859, provides that auction-purchasers shall not be entitled to demand a higher rate of rent from any persons whose tenure or agreement may be annulled by the sale, than was demandable by the former proprietor,

(*a*) S. D., 1850, 85, 1853, 631.

(*b*) See *B. Koolson*, H. C., 23rd March, 1867, and cases quoted above under "amount of rent payable."

(*c*) *Thakurani Dasya*, H. C., 19th June, 1865, F B.

(*d*) S. D, 1859, 408; VII S. R., 277; S. D., 1851, 603; *H. Rushton*, H. C., 4th March, 1863, *Ishwar Ghose*, 24th September, 1862, *Ramzan Nissa*, H. C., 5th November, 1866.

(*e*) Constr. 234; VII S. R, 430, II N. W. P., 386. As to Government, see *Nawab Nazim*, H. C., 11th June, 1866.

except in cases in which such persons may have held their lands at a lower rate of rent than would have been justly demandable, or in cases in which such persons are liable by custom to pay an enhanced rent. Section 37 has a similar provision.

Statutory Tenancies of Middlemen.—As to enhancement of the rent of statutory *taluks* in existence at the date of the Decennial Settlement. By Section 37, Act XI, 1859, the rents of tenures existing at the time of the Permanent Settlement, which have not been held at a fixed rent, "shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures" By Clause 1, Section 51, Regulation VIII, 1793, "the rent is not to be enhanced, except on proof that the *zamindar* is entitled to enhance, either by the special custom of the district, or by the conditions under which the *talukdar* holds his tenure, or that, by receiving abatements from his *jama*, he has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it."

As to the measure of enhancement, Section 8, Regulation V, 1812, provided that the rent of dependent *taluks* was to be calculated at the *pergunnah* rates payable by *ryots*, minus a deduction of ten *per cent.* on account of the *talukdar's* profits, and a further deduction for collection charges And this rule was always observed (*a*). When the *pergunnah* rates could not be ascertained, the assets were ascertained by survey, and the rent adjusted on the same principle (*b*). And the same rule holds good at the present time. The rent of a dependent *taluk* cannot be enhanced at discretion The proper rent is that paid by similar *taluks* in the neighbourhood (*c*) Dependent *talukdars* cannot claim the allowances called *dehaik* and *bharai* (*d*). *Jungleburi taluks* are, by their conditions, liable to enhance-

(*a*) II S R, 17, VII S R, 430, S. D, 1853, 502

(*b*) I S. R., 145.

(*c*) *Muhammad Azim-ud-din*, H C., 8th December, 1865.

(*d*) III S R., 381.

ment (*a*). Of course, if any dependent *talukdar* can prove payments of rent at a uniform rate from the time of the Permanent Settlement, he is now protected from enhancement by Section 15, Act X (*b*).

Suits for enhancement of the rent of ancient *taluks* usually proceed upon the ground that the *talukdar* has usurped lands in excess of his tenure. But this ground is not a valid one if the excess land has been held as part of the *taluk* from before the date of the Decennial Settlement (*c*), or even for sixty years (*d*). In regard to suits for enhancement, on the ground of usurpation of excess area, it has been said that the quantity of lands held by tenants was very generally under-stated in the *pottahs* granted about the time of the settlement, in order to correspond with the fraudulent reductions made by *zamindars* at that time in the nominal extent of every tenure upon their estates, for the purpose of imposing upon Government, and obtaining their estates in perpetuity on favorable terms (*e*). In a recent case it was said:—"Although the *pottah* specifies the number of *bighas* which it is supposed to cover, we do not think that it is to be construed as a *pottah* of so many *bighas*, and no more. We rather read it as a *pottah* of certain lands, the number of *bighas* being added more by way of description than limitation. It is well known that measurements given in *pottahs*, like the one before us, and of the date which it bears, were not such close or precise measurements as would be given in *pottahs* granted at the present day" (*f*). When the *pottah* was expressly for the

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(*a*) *Dhanpat Singh*, H. C., 5th May, 1864.

(*b*) *S. C.*

(*c*) *Janki Ballab Chuckerbutty*, H. C., 25th January, 1865.

(*d*) *J. Erskine*, H. C., 23rd July, 1867. See *Chandrabali*, Sutherland, P. C., 602.

(*e*) Constr. 234.

(*f*) *Janki Ballab Chuckerbutty*, H. C., 25th January, 1865. See under "Measurement."

whole of a given *mehal*, estimated to contain a specified area, and the lessee had been in possession since the settlement, enhancement was not allowed on its being discovered that the actual area was in excess of that specified (*a*) If the *pottah* specifies definite boundaries, the landlord cannot claim enhancement, on the ground that the area within those boundaries is in excess of that stated. Clause 3, Section 17, Act X, does not apply to *talukdars* (*b*). If the allegation be that the land usurped is beyond the area leased by the *pottah*, the landlord must prove that it is within his estate (*c*)

Contract Tenancies of Middlemen.—As to *taluks* and farms created after the date of the Permanent Settlement (22nd March, 1793), they are all presumed to be liable to enhancement, and the *onus* of proving a title to exemption rests wholly upon the tenant (*d*). Agreements not to enhance of course bind the lessor and those claiming under him (*e*), but not auction-purchasers of an estate sold for arrears (*f*). The rent of a *taluk* is liable to enhancement on proof of improved local rates (*g*), as also when the value of the produce, or the productive powers of the land have been increased by the agency of others, (as, for instance, by a Government embankment (*h*), and also on account of increase in the area of the holding by accretion or other means (*i*) Suit for enhancement is sometimes brought on the ground that the lessor's rent has been enhanced; but this does not appear to be

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(*a*) S D, 1849, 306.

(*b*) *Chundra Kant Mukherjya*, H C, 14th August, 1863.

(*c*) VI S. R., 86

(*d*) VII S R, 378, S. D., March, 1862, S D., 1859, 677.

(*e*) S D, 1845, 243

(*f*) S D, 1852, 958, 961

(*g*) V S. R, 102

(*h*) *Jadub Chunder Haldar*, H C, 30th May, 1864

(*i*) S D, 1853, 616. See cases cited in last paragraph and *Jagat Chunder Dutt*, H C., 20th August, 1866.

accepted as a valid ground (*a*). When a *zamindar* granted a *taluk* containing a specified quantity of land, and being afterwards called on to pay a higher revenue to Government in respect of a certain portion of this land, which was *noabad*, sued the *talukdar* for a corresponding enhancement, it was held that the claim was not valid (*b*). Sometimes the *pottah* contains conditions for enhancement. When the lease contained a condition that all lands found in the tenant's possession over a specified amount should be assessed at certain rates, it was held that the lessor was bound to measure before he could enhance (*c*). When a *putnee* lease reserved a rent certain to the *zamindar*, and provided that the Government revenue should be paid by the *putneedar*, and further stipulated that, even if the Government revenue should be enhanced, the *zamindar's* rent should not be abated, and as it happened the Government revenue was abated, it was decided that the *zamindar* could not claim enhancement, as he had stipulated for a certain fixed rent (*d*). But a condition in a lease that no rent will be charged for alluvial accretions will not stand good if the lessor is compelled by *vis major* to pay rent for such accretions (*e*). When the defendant took a *pottah* to clear and cultivate a *Sunderbun chuk* at a progressive rate of rent, it was held that the fact of his having settled *ryots* under him to supplement his own labor did not exempt him from enhancement as a *ryot* under Section 17, Act X (*f*).

(*a*) VII S. R., 430; but see *Amir-ud-din Muhammad*, H. C., 12th July, 1865, quoted below, and *Annoda Prasad Mukherjya*, H. C., 17th September, 1867.

(*b*) S. D., 1853, 616.

(*c*) S. D., January, 1860, 161.

(*d*) S. D., 1857, 1946.

(*e*) *Amir-ud din Muhammad*, H. C., 12th July, 1865.

(*f*) *Uma Churn Dutt*, H. C., 12th July, 1867 As to *hawalas*, see *Gholam Ali*, H. C., 3rd January, 1868. As to *Abadkars*, see *Tara Prosono Bhuttacharjya*, H. C., 28th August, 1867.

As to the measure of enhancement in these cases, strictly speaking, the tenants must pay any amount demanded by the *zemindar*, unless protected by special contract; but the usual practice is to assess old tenancies at the rates prevailing in the neighbourhood for similar tenancies (*a*). In one case, it was said, it was wrong to assess the rent of a *nim-hawala* in proportion to an enhancement of the *hawala* rent. The rent should be assessed according to the local rates paid by other *hawalas* (*b*). But when an alleged intermediate tenure is declared void, the assessment imposed should be at the local rates paid by *ryots*, without any deductions on account of *suranjami*, such as are allowed to middlemen (*c*). If a *ryot* be, in fact, an intermediate holder, some allowance must be made to him for intermediate profits (*d*). But an actual cultivator, having only a theoretical middleman's title, is entitled to no privileges of this sort (*e*). In one case, in which the local rates afforded no good criterion of a fair rent, inasmuch as they had remained stationary, though the lands had been improved, it was decided that two-thirds of the surplus profits of the lands, after deducting the former rent, would be a fair amount to allow the landlord (*f*). But of course no general rule of this sort can apply to all cases.

Statutory Tenancies of Ryots.—Ryots with rights of occupancy are, by Section 5, Act X, entitled to hold at "fair and equitable" rates of rent, and in cases of dispute the rate previously paid is to be deemed "fair and equitable," unless the contrary be shown in a suit by either party under Act X. And by Section 17, no such ryot shall be liable to an enhancement of the rent previously paid by him, except on some one of the three grounds specified in

(*a*) See *Muhammad Asim-ud-din*, H. C., 8th December, 1865.

(*b*) VII S. R., 430.

(*c*) S. D., 1853, 502.

(*d*) *Gouri Prasad Dass*, H. C., 3rd August, 1866.

(*e*) *Asmat Ulla*, H. C., 18th May, 1865.

(*f*) *Jadub Chunder Haldar*, H. C., 14th May, 1863; S. C., 30th May, 1864. This seems excessive.

that Section. Further, Section 37, Act XI, 1859, provides that no auction-purchaser of an estate sold for its own arrears shall be entitled "to enhance the rent of a *ryot* having a right of occupancy at a rent assessable according to fixed rules under the laws in force otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement may have been entitled to do."

The first ground of enhancement "is that the rate of rent paid by such *ryot* is below the prevailing rent payable by the same class of *ryots* for land of a similar description, and with similar advantages in the places adjacent." The principle prescribed in this Clause is that of the old Regulations, and must be strictly adhered to (*a*). When a landlord alleged as his ground of enhancement that the rates paid by the tenant were below the prevailing rates, he could not afterwards claim to enhance, upon the ground that the *pergunnah* rates were obsolete, or, in other words, that the rates of the whole neighbourhood were too low (*b*). A claim for enhancement on the ground of increase in the value of the produce is not consistent or compatible with a claim on the first ground. When the two grounds are joined in one suit, the plaintiff should be held to the first ground (*c*).

If a proprietor, on taking a settlement from Government, has, either expressly, or by the terms of proclamations and conditions of sale, accepted the *jamabandi* made by the Collector, he is precluded from disputing the correctness of that *jamabandi* as it existed at that time (*d*). Therefore a proprietor in this position cannot come in under the first Clause of Section 17, on the mere ground that the rate is below the prevailing rate, but must sue under the second or third Clause (*e*). In another case it

(*a*) *Dindyal Agusti*, H C, 19th July, 1864.

(*b*) *Lukhan Majhila*, H. C, 25th March, 1863.

(*c*) *Grish Chunder Dass*, H. C, 6th March, 1867.

(*d*) *Jogender Chunder*, S D, 17th September, 1859, S. D., 1858, 1521.

(*e*) *Sukhi Mani Haldar*, H C, 25th July, 1864.

was said the purchaser of a Government estate cannot enhance the rents recorded in the *jamabandi* without proving that the value of the lands has increased since the settlement (*a*). But ordinarily he may enhance rents, unless restrained by his lease (*b*). The Agra Court has repeatedly held that settlement *jamabandis* are not to be accepted as unquestionable records of facts, but are open to revision by the Courts when their correctness is challenged (*c*). In one case the plea was set up that the permanent settlement of the 24-*Pergunnahs* was made on the condition that the *jamabandi* should be maintained without change; but this plea was held invalid (*d*) The mere fact of a *ryot's* name having been recorded at the settlement as an hereditary cultivator at a fixed rate of rent, there being no special proviso that the rent was not to be enhanced, does not bar enhancement (*e*). In order to protect a *ryot*, the recognition of his rights at settlement must have been formally made, and the ticket granted at the time of settlement is not such a recognition within the meaning of Section 9, Regulation VII, 1822 (*f*).

As to "rates payable in the places adjacent," it has been held that the rates with which the comparison is made need not be those of the identical village in which the land is situated (*g*). And similarly the Agra Court has held that the fact that the adjacent fields in the field map are not charged with the same rent in the *jamabandi*, is no ground for reversing an order of assessment (*h*). A selection of the average rates of adjacent land should not be adopted, but the actual rates of similar lands with

(*a*) *Ram Lochan Pal*, H. C., 21st July, 1864.

(*b*) *Ramjan Nissa*, H. C., 5th December, 1864.

(*c*) *Ushbar Pandy*, N. W. P., 8th December, 1863; *Dindyal*, 3rd April, 1860, F. B.

(*d*) S. D., 1855, 357.

(*e*) *Kuramat Ali*, H. C., 26th August, 1864 (?)

(*f*) S. D., 1859, 1044.

(*g*) *Dakhina Mohun Rai*, H. C., 5th August, 1863.

(*h*) *Rahman*, N. W. P., 19th March, 1862.

similar advantages (*a*). Each description of land should be assessed separately according to its quality (*b*). Thus *Bastu* lands should be assessed at the rate paid for *Bastu* (*c*) Fallow lands, when cultivated, must be assessed at the full rates paid for cultivated lands of the same quality (*d*). But it should be observed that all the lands about an indigo factory are not necessarily *Bastu* (*e*). Not only the rates payable by adjacent lands, but also the circumstances and peculiarities of the soil, must be considered (*f*). In one case, the Lower Court exempted from enhancement a tank and a garden, on the ground that they had been made at the tenant's expense; but it was held that they must be assessed at the rates paid for tanks and gardens (*g*). But in another case, certain land brought into cultivation by the *ryot* at considerable expense was exempted from enhancement, the High Court observing that, in assessing a fair and equitable rent, "no consideration demands greater attention than this, that the tenant shall not be called on to pay to his landlord under the name of rent, what is, in fact, not rent, but the produce of his own labor and capital sunk in the land" (*h*).

As to same "class of *ryots*," Mr. Campbell says the term "occupancy ryots" includes many grades of different degrees of rights, and each *ryot* should remain in the same position relatively to his *zamindar*, and comparatively to the other *ryots*,

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(*a*) *Putee*, N. W. P., 20th February, 1865. See *Rausharan Singh*, H. C., 4th January, 1868.

(*b*) *Sahib Ram*, N W. P, 30th June, 1865.

(*c*) *T. Kenny*, H. C., 4th February, 1864.

(*d*) S D, 1858, 1860.

(*e*) *Prem Lall*, H. C., 10th December. 1866.

(*f*) *Mir Madat Ali*, N. W. P, 12th May, 1863.

(*g*) *Lukhan Majhila*, H. C., 25th March, 1863 (?) See case of *Dino Nath Malik* cited in next para

(*h*) *Nur Muhammad*, H C., 31st May, 1864. See Section 37, Act XI, 1859, cited in next para.

which he has hitherto held (*a*). If a *ryot* of a superior class has from ancient times paid a rent which leaves to him half the surplus produce, and a rise occurs in the value of the produce, his rent ought not to be run up to the level of those paid by the least favored classes of *ryots*, but only in proportion to the rise of prices (*b*). *Brahmins* and *Kaysts* often set up a claim to hold on favorable terms; and it seems that the Agra Court sometimes allow this claim (*c*). In other cases they have held that the mere fact of a cultivator having been allowed to hold at favorable rates for a number of years gives him no title to continue so to hold (*d*). And in the case of resumed *chakeran* or *muaafi* tenures, the rule appears to be that the claim to hold at favorable rates is not a valid one (*e*). It would seem that a *kadimi khudkasht ryot* should, under this proviso, be assessed somewhat more lightly than a recent occupant.

The second ground of enhancement is "that the value of the produce or the productive powers of the land have been increased otherwise than by the agency or at the expense of the *ryot*." It should be observed that this Clause only makes an increase in the value of the produce a ground or occasion for enhancement. This does not necessarily imply any particular mode of calcu-

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(*a*) Mr. Thomason says:—"Throughout Hindoostan, there is a large body of persons possessing a heritable and transferable property in the soil who are also cultivators, and their profits as proprietors and as cultivators are sometimes so mixed together, that it is difficult to distinguish between them and non-proprietary cultivators. In Bengal no attempt was made to distinguish proprietary from non-proprietary cultivators, but all were left indiscriminately to the mercy of superiors who contracted for the Government revenue, and who (whatever was their origin) were distinct from the village proprietors." (Directions to Settlement Officers, para. 121.)

(*b*) Minute, 1st June, 1864. See *Raushan Sing* H. C. 4th January, 1868.

(*c*) *Waris Ali*, N. W. P., 25th March, 1865.

(*d*) *Karamat Ali*, N. W. P., 24th December, 1862; *Mulchand*, 24th December, 1862.

(*e*) *Hursahai*, N. W. P., 11th July, 1863; *Ghulam Husain Khan*, 26th August, 1864.

lating the enhanced rent, (for instance, that the new rent should be calculated on an ascertainment of the value of the produce, and a comparison between that value and the cost of production, which system was tried in settlement proceedings, and repeatedly condemned) (*a*). Consequently, the proper measure of enhancement under this Clause was for some time a much disputed question In the case of *Ishwar Ghose* vs. *J. Hills* (*b*), it was laid down that, in a revision of rent in consequence of an increase in the value of the produce, a *ryot* with a right of occupancy is not entitled to have it fixed at a lower rate than that which an ordinary contract *ryot* would give. "A *ryot* with a right of occupancy," it was said, has no such interest in the land as to entitle him to a share of the rent. He has merely a right to occupy the land in preference to any other tenant, so long as he pays a "fair and equitable" rent. He may or may not, according to circumstances, be entitled, on account of increased expenditure, to a share of any increase of the gross proceeds, but he is not entitled to a share of the net proceeds or rent of the land" (*c*). The Court laid down that the enhanced rent was to be calculated by ascertaining the value of the gross produce, and deducting therefrom "all the outgoings belonging to its cultivation, of whatever

(*a*) See Peters, 321; Directors' Despatch, 12th April, 1837; Board's Rules, Chapter XX, Section V, 1 5, Section 2, Regulation IX, 1833.

(*b*) H. C., 24th September, 1862, 2nd September, 1863, 17th March, 1864.

(*c*) This doctrine utterly destroys the only thing which makes a right of occupancy of any value, and is equivalent to a decision declaring that the fines of copyholders in England instead of being limited by the "reasonable" amount sanctioned by custom, *viz.*, two years improved value of the land on each succession, (William's Real Property, 323,) should be calculated according to the rates of rent settled by the competition of the market, and paid by ordinary tenant farmers. Perhaps the most remarkable point about the doctrine was that it professed to be based upon reasons of Political Economy, though Mill lays down in the clearest terms that rents of this sort are regulated by custom, and not by competition. Political Economy, Book II, Chapter IV, Section 2, Chapter IX, Section 4.

kind, including the profit of the capital employed by the tenant, estimated according to the *usual market rate* of agricultural capital for the time being (*a*). In the next cases on the subject, it was observed that this was "a tedious, and in practice impossible, process," and the doctrine that the rents of occupancy *ryots* were to be adjusted according to the rates settled by the competition of the market was controverted. It was said the proper mode of ascertaining what is a fair and equitable rent under this Clause is to enquire what rent is paid for land of equal fertility by *ryots* of the same class in the places adjacent, according to the custom of the country, and assess the rent at that rate, which, under that custom, appears fair and equitable. But if it appears that rents in the neighbourhood have not adjusted themselves to the altered circumstances of the lands, the rent should be adjusted according to the method of proportion, that is, the increased rent must bear to the old rent the same proportion as the present value of the produce bears to its former value" (*b*). In consequence of these conflicting decisions, the matter was referred to the Full Court, to whom the following questions were proposed:—"When there has been an increase in the value of the produce arising simply from a rise in prices, and not from the agency either of the *zamindar* or the *ryot*, and the *zamindar* is entitled to a new *kabuliyat* from an occupancy *ryot* for an enhanced rent at fair and equitable rates, is the fair and equitable rate to be awarded that which might be obtained by competition in the market, or is it a rate to be determined by

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(*a*) The rent ultimately awarded in this case was at the rate of Rs. 1 0-3 *per bigha*, the ordinary local rates at the time being 9, 10, and 12 *annas*. It is said the decree was never executed, as it was well known that no new tenants would come forward to take the place of the evicted tenants at the rate decreed Minutes by Mr Jackson, dated 6th August, 1864, and Mr. Allen, dated 24th December, 1864. This would go to show that the rents obtained by this process were too high, even according to market rates.

(*b*) *Hara Mohun Mukherjya*, H C., 14th September, 1864; *Shib Narain Ghose*, 26th November, 1864.

the custom of the neighbourhood in regard to the same class of *ryots?*" "If the customary rate of the neighbourhood has not been adjusted with reference to the increased value of the produce, then on what principle is the customary rate to be adjusted?" Mr. Trevor, (with whom the great majority of the Court agreed) after remarking on the error of supposing that the principle of competition has ever in this country, to any appreciable extent, determined the mode in which the gross produce shall be divided between the *zamindar* and the *ryot*, answered the questions put to the Court as follows:—"The terms 'fair and equitable,' when applied to tenants with a right of occupancy, are to be construed as equivalent to the varying expressions '*pergunnah* rates,' 'rates paid for similar lands in the adjacent places,' and 'rates fixed by the law and usage of the country,'—all which expressions indicate that portion of the gross produce calculated in money to which the *zamindar* is entitled under the custom of the country (*a*). As the Legis-

(*a*) The error committed in *Ishwur Ghose's* case was in assimilating the relation of the *zamindar* to the occupancy *ryot* with the relation of a landlord to a tenant farmer, whereas it much more nearly resembles the relation of the lord of a manor to copyholders holding at customary rents. Harington says:—"It is in attempting to assimilate the complicated system which we found in this country with the simple principles of landlord and tenant in our own, and in applying to the Indian system terms of appropriate and familiar signification which do, not without considerable limitation, belong to it, that much, if not all, of the perplexity ascribed to the subject has arisen. If by the terms "proprietor of land" and "actual proprietor of the soil" be meant a landholder possessing the full rights of an English landlord or freeholder in fee-simple with equal liberty to dispose of all the lands forming part of his estate, as he may think most for his own advantage, to oust his tenants, whether for life or years, on the termination of their respective leases, and to advance their rents on the expiry of their leases at his own discretion, such a designation is not strictly and correctly applicable to a Bengal *zamindar*, who does not possess so unlimited a power over the *khudkasht ryots* and other descriptions of under-tenants possessing as well as himself certain rights and interests in the lands which constitute his *zamin-*

lature directs that, in cases of dispute, the existing rent shall be considered fair and equitable until the contrary be shown, that rent is to be presumed (in all cases in which the presumption is not by the nature and express terms of the written contract rebutted) to be the customary rate included in the terms '*pergunnah* rate,' 'rates payable for similar lands in the places adjacent,' and 'rates fixed by the law of the country.' In all cases in which the above presumption arises, and in which an adjustment of the rent is requisite in consequence of a rise in the value of the produce caused simply by a rise of price, and by causes independent both of the *zamindar* and the *ryot*, the method of proportion should be adopted in such adjustments; in other words, the old rent should bear to the existing rent the same proportion as the former value of the produce of the soil, calculated on an average of three or five years next before the date of the alleged rise in value, bears to its present value. In all cases in which the above presumption is rebutted by the nature and express tenor of the old written contract, the re-adjustment should be formed on exactly the same principle as that on which the original written contract was based; and in cases in which it appears from the express terms of the previous contract that the rent then payable by the tenant were below the ordinary rate paid for similar land in the places adjacent, in consequence of a covenant by the tenant to cultivate indigo or other crops, the old rent must be corrected, so as to represent the ordinary rate current at the priod of the contract, before it can be admitted to form a term in the calculation to be made according to the method of proportion above laid down" (*a*). A temporary and passing increase in the value of the produce (such as accidental high prices on account of scarcity) is not a valid ground for enhancement (*b*). A slight departure from the principles of

dari." III Harington, 399. It is worthy of note that the word "landlord" is never used in the Regulations. See Sutherland, P. C, 478.

(*a*) *Thakuram Dasya*, H. C., 19th June, 1865, F. B.

(*b*) *Bhagwath Dass*, H. C, 31st July, 1866.

the leading case was not interfered with when the objection was not raised (*a*). The formula was slightly altered in a case in which the value of the produce had increased, but the productive powers of the land had diminished (*b*). A landlord is entitled to enhance in respect of fruit trees, as being the produce of the land, but not in respect of profits of stalls leased to people holding a *mela* on the ground (*c*).

As to "increase in the productive powers of the land," it has been decided that this evidently contemplates cases where the productive powers of the land have been increased by the employment of large means and particular appliances; for instance, by marked improvements in communication by roads or railways, by extensive schemes of drainage, and the like. Where a *ryot* simply puts land to its natural use, as for instance, where he merely plants a few bamboos, or fences the land adjoining his homestead, and calls the place a garden, this is not an improvement of the productive powers of the land by the agency of the ryot such as to exempt him from enhancement. Such lands should be rated under Clause 1 at the amount paid for other *baghat* land (*d*). In another case it was said that "if a *ryot*, by his own labour, and at his own expense, converts one kind of land into another; for instance, if he brings jungle into cultivation after a reasonable time, he is liable to pay the full *pergunnah* rates of cultivated land. But if he has to do more than bring into cultivation uncultivated land, if the land he originally received was salt land, which could only be made sweet by special works of the *ryot*, or rock, which could only be made culturable by special labour, then the *ryot* who made those works, or expended that special labour, would be entitled to hold at exceptionally low rates. So again if, having received ordinary land, he

(*a*) *Ram Tarak Ghose*, H C., 31st July, 1866.
(*b*) *Saodamini Dasya*, 29th January, 1867.
(*c*) *Kewaja Chyman*, H C., 27th August, 1864.
(*d*) *Dino Nath Malik*, H. C., 12th August, 1864.

were to convert it into land of specially high value, he would not be liable to pay at exceptionally high rates, but only the ordinary rates paid on land of the same quality, irrespective of the special character impressed on it by himself. The ground for enhancement being proved, it does not always follow that the *ryot* shall pay an enhanced rent. It may be that, looking to all the circumstances of the case, the rate already paid is still fair and equitable; and this will often be the case when the landlord comes in to enhance on the ground of neighbouring rates, or improved productive powers, while the tenant pleads that the rates paid by him are fair, looking to the improvements made by him" *(a)*. A rise in the value of land, resulting from a portion of a town being swept away by a river, is not an increase in the productive powers of the land within the meaning of this Clause *(b)*. The *onus* of proving that the increase is not due to the agency or expense of the *ryot* lies on the landlord *(c)*. In enhancing the rent in consequence of any permanent increase in the productive powers of the land, independent of the agency of the tenant, due reference must be had to the increased expenses of cultivation *(d)*. *Jungleburi* tenants are not exempt from enhancement on the ground of having cleared the ground at their own expense *(e)*.

The third ground of enhancement is "that the quantity of land held by the *ryot* has been proved by measurement to be greater than the quantity for which rent has been previously paid by him." The *onus* of proving the excess area is upon the landlord, who must proceed under Section 9, Act VI, 1862, B. C., to

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(a) *Chowdhary Khan*, H. C., 27th January, 1865; *Grish Chunder Dass*, 6th March, 1867.

(b) *Khunkar Abdur Rahman*, H. C., 9th August, 1867.

(c) *Polin Bahare Sen*, H. C., 31st January, 1868, F. B.

(d) *Kanouji Lall*, N. W. P., 1st April, 1863.

(e) *Dhanpat Singh*, H. C., 6th May, 1864. See *Mohamoy Dasya*, H. C., 23rd January, 1867.

measure the land. It is not for the Court to measure (*a*). But if a local enquiry, ordered for the ascertainment of rates, disclose an excess area, the decree must follow the disclosure (*b*). When the *pottah* defines the boundaries and the area, the rent cannot be enhanced on the ground that the actual quantity of land held by the tenant is greater than the quantity specified, provided the whole of the land be within the boundaries (*c*). When the *pottah* was for 15 *bighas* of land within specified boundaries, with a condition for abatement if the area turned out to be less, the rent could not be enhanced when it was found that the boundaries included over 15 *bighas* (*d*). When the tenant held under a *pottah*, dated 1790, certain land over and above the quantity stated therein, this was held no reason for enhancement (*e*). But when a *mukurarri pottah* of recent date was for 3 *bighas* 14 *kattahs*, and the tenant was found to hold over 6 *bighas*, enhancement was allowed (*f*). These cases agree with the rule laid down by the Sudder Court, that possession of land in excess of the quantity specified in the *pottah* is not a ground for enhancement, when such possession has been of very long duration (*g*). It has been held that if a tenant encroaches and cannot show which is his own land, it may be assumed that he has encroached on the best land, in the same manner as a man who appropriates property may be presumed to have taken property of the best quality (*h*).

(*a*) *Hara Mohan Mukherjya*, H. C., 6th August, 1864.

(*b*) *Ras Mani Dasya*, H. C., 6th August, 1864.

(*c*) *Ram Narain Nundy*, H. C., 17th February, 1864; *Hara Prosad Rai*, 17th July, 1865.

(*d*) *B Limond*, H. C., 30th June, 1864.

(*e*) *Janki Ballab Chuckerbutty*, H. C., 25th January, 1865

(*f*) *Bipra Dass Dey*, H. C., 31st March, 1864.

(*g*) S. D., 1849, 306.

(*h*) *Durgakant Muzumdar*, H. C., 5th April, 1864. See *Armory* vs. *Delamirie*, I Smith's L. C., 256.

In several recent cases, in which tenants have knowingly encroached upon lands in excess of the quantity specified in their *pottahs*, it has been ruled that they must be treated as trespassers as far as regards such excess lands; and that a suit for enhancement will not lie against them (*a*). In one case it was said that if boundaries be given in the lease, the tenant overstepping them is clearly a trespasser; but if there are no boundaries, he is not necessarily a trespasser; and may be sued for enhancement (*b*). An alluvial accretion to a tenure is liable to assessment (*c*). But when the excess land was a dried-up *jhil*, it was necessary to ascertain whether the land had become fit for cultivation before decreeing enhancement (*d*). If a *ryot* assert a custom of deduction of area rent-free on account of hedges and boundaries, the *onus* is on him (*e*). The Agra Court ruled that it was wrong to dismiss a claim altogether on the ground that the excess area was but slight (*f*). A proviso that a tenant shall pay at *Pergunnah* rates for any land which, by future measurement, may be found to be in excess of the recorded area, is inserted as a measure of precaution to prevent tenants from encroaching on the *khas* lands of the *zamindar*, and does not vary the strict terms of the lease binding the tenant to pay rent for the area found by a prior measurement (*g*).

As to the measure of enhancement under this Clause, it was said in the case of *Ishwar Ghose* that the rent must not be enhanced beyond the amount warranted by the ground of enhancement; and it would seem, therefore, that the rent on

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(*a*) *Rosham*, H. C, 29th August, 1866.
(*b*) *Syam Jha*, H C, 4th February, 1867.
(*c*) *Jagat Chunder Dutt*, H. C., 20th August, 1866.
(*d*) *Muhammad Wasil*, H. C, 7th April, 1863. See S. D., 1852, 38.
(*e*) *Hara Chowdhry*, H. C., 15th August, 1866.
(*f*) *Khushali Ram*, N. W P., 8th April, 1864.
(*g*) *T. Cowjon*, H. C., 16th February, 1864.

account of the excess area should be adjusted according to the rates paid for the original area (*a*).

Contract tenancies of ryots.—It was for a long time supposed that *ryots* without a right of occupancy could not call upon the Courts to adjust their rents for them, as by law they must either pay what rent the landlord demands, or quit the land. And this seems reasonable (*b*). But Section 14, Act X, unquestionably recognises the right of all under-tenants to contest their liability to enhancement. As might be expected, the decisions as to the measure of the rent in these cases are most conflicting. Sometimes it is said that a tenant-at-will, who holds on after notice of enhancement, is liable to pay the highest rack rent the land will bear (*c*). In other cases, it is said, he is entitled to hold at a fair and reasonable rent (*d*). In a suit for arrears at an enhanced rate, it was held that the landlord might eject the tenants if they would not agree to the rate of rent demanded by him; but if he elects to sue for arrears, he cannot recover more than is fair and equitable (*e*). When the tenant failed to prove a *maurusi pottah* set up by him, and was therefore considered as a tenant without any rights of prescription or occupancy, it was held that the question to be tried was what, under all the circumstances, was a fair and reasonable rate (*f*). Even when a tenant is allowed by the landlord to hold land without any agreement at all, he is liable retrospectively only to a fair demand (*g*). *Ryots* holding under

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(*a*) See Clause 1, Section 4, Regulation XI, 1825, quoted under "Right to Accretion" in Chapter IV.

(*b*) *Radha Sundari Guptia*, H. C., 27th July, 1865; *Lalla Shib Lall*, 3rd March, 1863.

(*c*) *Kadir Sardar*, H. C., 29th June, 1865; *Movul-ud-din Mirdha*, 14th December, 1865.

(*d*) *Shaikh Mohun*, H. C., 12th March, 1863.

(*e*) *Kali Shaikh*, H. C., 24th September, 1862.

(*f*) *Pitumber Saha*, H. C., 9th January, 1865.

(*g*) *T. Stalkartt*, H. C., 19th July, 1864.

indefinite leases, without a right of occupancy are entitled to have their improvements considered when an enhanced rate is fixed (*a*). A *ryot* without a right of occupancy cannot, of course, claim the benefits of Section 17, Act X (*b*). In the case of such ryots the bare allegation that a higher rate can be obtained is a sufficient ground for enhancement (*c*).

As to building leases there is a special rule. Section 37, Act XI, 1859, provides that auction-purchasers may enhance the rent of lands whereon dwelling-houses, manufactories, or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk, "if they can prove the same to have been held at what was *originally* an unfair rent, and if the same shall not have been held at a fixed rent equal to the rent of good arable land for a term exceeding twelve years, but not otherwise" (*d*). Several doubts have been raised as to the proper construction of this Section, and they do not appear to have been very satisfactorily solved as yet. Reading the Section by itself, and comparing it with the terms used in the former sale laws, it would seem that leased lands which have been built on are protected, no matter whether the lease was specially granted for building purposes or not. But when the purchasers of a *khas mehal* sued the owner of an indigo factory for a *kabulyat* for a term of five years at the *Pergunnah* rate for *bhita* lands, and the defendant pleaded that the factory had been built sixty or seventy years back, that when it was built the land was of the same quality

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(*a*) *Mothura Mohan Saha*, H. C., 27th July, 1864.

(*b*) *Hurdyal*, N. W. P., 1st November, 1862.

(*c*) *Utam Singh*, N. W. P., 5th July, 1864.

(*d*) This is an extension of the rule in the former sale laws (Section 30, Regulation XI, 1822, Section 26, Act I, 1845), which only protected such lands when held under leases granted expressly for purposes of building, &c. S. D., 1849, 306. *Sati Churn Deb*, H. C., 9th September, 1862.

as other lands used for growing indigo, and that he had once obtained a lease for the term of one year, the Court held that the temporary farming lease contained nothing to show that it was taken for building purposes, and therefore that the defendant was not protected from enhancement (*a*). But from another case it would seem that the terms of the original lease are immaterial (*b*). Then again there seems to be some doubt as to the nature of the buildings referred to in the Section. Where a lease had been granted, at a *mukta* (stipulated or fixed) rent, of certain lands in the town of Rampore Beauleah for *bashat bari* (*i. e.*, to live and reside in), and the tenant built a *pukka* house on the land, it was held that he was not protected from enhancement by this Section (*c*) In another case in which a tenant had held about sixteen years under a ten years' *basha bari pottah*, and had constructed buildings and planted gardens on the land, it was held that the sole object of the *pottah* was to enable the tenant to reside on the land by the construction of a "lodging house," and that such residence could not even be considered as an occupation of land within the meaning of Section 6, Act X (*d*). *Bastu* or homestead lands are liable to enhancement under the ordinary rules (*e*). A doubt may arise from the wording of the Section, whether lands, simply by being built upon, do not become entitled to the privileges accorded by this Section, and the argument is constantly raised that if lands of this sort are protected against auction-purchasers *à fortiori*, they must be protected against ordinary *zamindars*. In the North-West Provinces, planting trees on arable lands without the landlord's consent is considered a breach of the conditions of the tenancy, and it is sometimes

(*a*) *Saroda Sundari*, H. C., 9th January, 1865.
(*b*) *Jagat Ishwari Dasya*, H. C., 8th March, 1867.
(*c*) *Nufar Chunder Saha*, H. C., 14th July, 1866.
(*d*) *Kalikissen Biswas*, H C, 24th July, 1867 (?)
(*e*) *J. Kenny*, H. C, 4th February, 1864.

said that *ryots* cannot build on their lands without express license.

Remedies for enforcing enhancement.—There are two modes of enforcing enhancement of rent: issue of notice under Section 13, Act X, followed by suit for arrears at the enhanced rate; and suit for *kabuliyat* at the enhanced rate.

Notice of enhancement.—Section 13, Act X, provides that no under-tenant or *ryot* who holds or cultivates lands without a written engagement, or under a written engagement not specifying the period of such engagement, or whose engagement has expired, or has become cancelled in consequence of the sale for arrears of rent or revenue of the tenure or estate in which the land held or cultivated by him is situate, and has not been renewed, shall be liable to pay any higher rent for such land than the rent payable for the previous year, unless a written notice shall have been served on such under-tenant or *ryot* in or before the month of *Cheit*, specifying the rent to which he will be subject for the ensuing year, and the ground on which an enhancement of rent is claimed. Such notice shall be served by order of the Collector on the application (which may be on plain paper) of the person to whom the rent is payable, and shall, if practicable, be served personally on the under-tenant or *ryot*. If not practicable, it may be affixed at his house, or if he have no house in the district, at the *mal cutcherry* of the land, or at some conspicuous place in the village. It is sometimes said that this Section is not applicable to middlemen (*a*). But the word "under-tenant" certainly includes "middlemen" (*b*). And in some cases notice appears to have been required in the case of middlemen (*c*). The notice is necessary in the case of *ryots*

(*a*) *Nathu Ram*, H. C., 24th June, 1864; *Mujib-un-Nissa*, N. W. P., 6th November, 1861; *Auson*, 22nd January, 1862.

(*b*) III, Harington, 414.

(*c*) *Ishan Chunder Manik*, H. C., 29th April, 1863, *Pertab Chunder Singh*, 6th March, 1866.

without rights of occupancy, as well as in the case of occupancy *ryots* (*a*). There are a great many rulings regarding this and the corresponding Section 9, Regulation V, 1812.

As to the contents, it must contain the grounds of enhancement. If these are omitted, it is no notice at all (*b*) It must be reasonably precise. A notice to pay a lump sum for the whole land in and out of the tenant's possession is not sufficient (*c*). If the notice gives the area, which it need not do, the rent will be liable to adjustment if it is wrongly given (*d*). It must specify the rent demanded, and how the landlord has acquired the right of enhancing (*e*). It need not mention the former rent (*f*). The landlord may sue for a lower rate than that mentioned in his notice, but not for a higher (*g*). A notice is not wholly vitiated, though it may have included land to which the landlord had no title (*h*). If the notice disclose no grounds of enhancement, this will be fatal to the suit (*i*). A general notice prohibiting *ryots* from cultivating is not sufficient (*j*). The objection arising from informality of notice may be waived (*k*). The notice need not mention the names of all the tenants in possession, but only those of the recorded tenants (*l*).

As to signature of the notice, it has been held that a *nail* may

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(*a*) *Bhoj Singh*, N. W. P., 27th July, 1864, F. B., *Hurdyal*, 1st November, 1862.

(*b*) *Raj Kissen Rai*, H. C, 24th June, 1864; *Abdur Rahman*, 9th August, 1867; *Gunesh Ram*, N. W. P., 31st July, 1862; *Jung Singh*, 16th August, 1864.

(*c*) *Tarachand Rai*, H. C., 21st July, 1864.

(*d*) *Khetra Nath Dass*, H. C., 5th August, 1863.

(*e*) VII S. R, 156.

(*f*) VII S. R., 388.

(*g*) *J. Hills*, H. C., 1st August, 1864.

(*h*) *Chunder Kumar Rai*, H. C., 12th July, 1864.

(*i*) *Bhawani Nath*, H. C., 7th January, 1864.

(*j*) S D, 1850, 8.

(*k*) *Hira Lall Seal*, H. C., 9th August, 1862.

(*l*) VII S. R., 261.

sign one without special authority (*a*). But when the notice had been signed by one who had no right of property, and who was not the proprietor's agent, it was held that the notice was informal, and that the informality could not be cured by a subsequent ratification by the proprietor, because the tenant is entitled to a notice he can act upon with certainty at the time he receives it (*b*). From a recent case it would seem that the signature of the landlord or his agent is not indispensable, if it is issued obviously on the part of the landlord (*c*). A landlord who has farmed his estate cannot issue a notice (*d*). The Collector's seal and signature need not be attached to the notice (*e*). A Deputy Collector may issue notices without special authority (*f*).

As to the persons on whom notice is to be served, it has been held that where a tenure is held by several recorded tenants, the notice must by served on all, even though they live in one house (*g*). If some of the co-tenants are *benami*, it is not necessary to serve notice upon them. It is sufficient to serve it on the tenant with whom the landlord has always dealt as in possession (*h*). If the wife has been recognized as the tenant, a notice to the husband is not sufficient (*i*). Service upon an agent is not enough. There must be personal service, or if that is impossible, publication (*j*). One notice was sufficient for seventy-five holdings in nineteen villages, when the parties had been in the

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(*a*) *Digumber Mitter*, H. C., 13th March, 1863.

(*b*) S D., 1858, 295.

(*c*) *Hara Nath Rai*, H. C., 27th April, 1864.

(*d*) *Binodi Lall*, H. C., 10th August, 1865.

(*e*) *Jaga Mohan Chatterjya*, H C., 21st December, 1864.

(*f*) *Nazir Ali*, H. C., 14th February, 1865.

(*g*) *J. Lyon*, H. C., 3rd February, 1865.

(*h*) *Ram Narain Mukherjya*, 24th November, 1864. See *Naba Kumar Ghose*, H. C., 15th July, 1864.

(*i*) *Sri Ram Ghose*, H C., 29th August, 1865.

(*j*) *Chundra Mani Dabya*, H. C., 3rd January, 1867.

habit of treating them as a single holding (*a*). But separate and distinct holdings cannot be thus treated (*b*).

As to the time of service, it has been held that the notice must be served within the time allowed by law. A notice served on 1st *Bysakh* was informal (*c*). The Agra Court has held that the notice itself must be served in or before the month of *Cheit*. The mere fact that the application to the Collector was presented before the close of *Cheit* is not sufficient (*d*). In one case, where the notice had not been served till *Assar*, the Court decided that, though this was informal, the landlord was entitled to enhanced rent from the commencement of the year following that in which the Courts decreed his title to enhance (*e*). Notice though served for one year, may be good for a subsequent year (*f*).

An indigo factory has been held to be a conspicuous place on the land (*g*).

This Section is binding even on a landlord who holds an unexecuted decree for enhancement under the old law (*h*); and also when the landlord has agreed to suspend his rights under such decree (*i*). No notice is necessary when there has been a decree for a *kabuliyat* at specific rates, even though the rent be in excess of that hitherto paid (*j*). The Agra Court has held

(*a*) *Jadub Chundra Haldar*, H. C., 14th May, 1863.

(*b*) *Bijaigobind Bural*, H. C., 24th July, 1867.

(*c*) *Mahtab Deb*, H. C., 18th September, 1863.

(*d*) *Jewno*, N. W. P., 16th January, 1864. But see *A. Rodger*, H. C., 22nd July, 1867.

(*e*) S. D., April, 1861, 165.

(*f*) *Muhammad Rahimudin*, H. C., 13th December, 1866.

(*g*) *Hara Nath Rai*, H. C., 27th April, 1864.

(*h*) *Indri Singh*, H. C., 6th December, 1864; *F. Mackintosh*, 4th December, 1866. But see S. D., 1858, 603.

(*i*) *Budh Naraian Singh*, H. C., 23rd November, 1867.

(*j*) *Goursunder Chowdhry*, S. D., 29th May, 1862; *Ishan Chunder Rai*, 2 ith June, 1862; XI N. W. P., 413; *Ramjiwan Bose*, H. C., 30th March, 1863; *Madhub Chunder Ghose*, 9th August, 1866.

that no notice is necessary before suing to assess lands for the first time (*a*).

It was at first held that notice was a necessary preliminary to a suit for a *kabuliyat* at enhanced rates (*b*). Then it was ruled that such suits might be brought without previous notice, but in that case the enhanced rate would be payable only from the commencement of the year following the decree (*c*). And it has now been settled by the majority of a Full Bench that notice in these cases is not necessary (*d*).

No notice is necessary when a tenant's rent is settled under Section 9, Regulation VII, 1822 (*e*). Government must serve notices of enhancement like ordinary landlords (*f*). An annual notice is not necessary (*g*). Notices issued by former landlords can avail those only who claim title from them (*h*) The necessity for service of notice is not done away with by the circumstance of the tenant paying a higher rent for another moiety of his tenure to another landlord (*i*). The landlord is not always bound to demand the enhanced rent the first year after issuing the notice (*j*). The cases as to suits to contest notice are given in Chapter IV.

Suit for arrears at enhanced rate.—There are great many rulings as to points of practice in these suits.

(*a*) *Rai Manik Chand*, N W. P., 15th March, 1865.

(*b*) *Jaikissen Mukherjya*, H. C., 31st March, 1862, Constr. 257, *Heenatulla*, H. C., 13th March, 1863.

(*c*) *Jan Ali*, H. C., 5th January, 1864.

(*d*) *Ram Kant Chowdhry*, H. C., 7th July, 1864, F. B.; see *Rai Manik Chand*, N. W. P., 16th March, 1865.

(*e*) *Hara Prasad Rai*, H. C., 21st December, 1866.

(*f*) *Nawab Nazim*, H. C., 11th June, 1866.

(*g*) S. D., 1853, 912.

(*h*) S. D., 1851, 434.

(*i*) *Nyamat Ali*, H. C., 12th March, 1863, *Salikram Upadhya*, 30th June, 1864.

(*j*) *Muhammad Rahimudin*, H C, 3rd December, 1866.

As to limitation, Section 32, Act X, provides: "If the suit be for the recovery of rent at a higher rate than was payable in the previous year, such rent having been enhanced after issue of notice under Section 13, and the enhancement not having been confirmed by any competent Court, the suit shall be instituted within three months from the end of the Bengal year, or of the month of *Jeyt* of the *Fasli* or *Wilayati* year on account of which such enhanced rent is claimed." It should be observed that this limitation does not apply to cases in which a *kabuliyat* has been executed, or in which the enhancement has been fixed by a competent Court. Under the old law, the right of action in a suit for declaration of right to enhance was generally regarded as a constantly recurring one (*a*).

As to the persons who may sue, it has been held that one of several sharers in a joint undivided estate is not entitled to sue for enhancement of the rent of a tenant holding a specific portion of land in the undivided estate (*b*). But if there is no *pottah*, and nothing to preclude enhancement, one joint sharer may sue alone for enhancement of the rent of his undivided share (*c*). This ruling does not tally with the cases, as to joint sharers suing for arrears, quoted under the head of "Rent Suits." The old rule was that if one sharer wished to sue for enhancement, and the others refused to join him, they should be made parties to the suit (*d*). When there has been a private partition, each sharer may sue the *ryots* in his own portion separately, without joining the other sharers as co-defendants (*e*). A tenant may sue to enhance the rent of his under-tenant even though he himself

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(*a*) S D, 1850, 158; 1856 617, VII S. R., 499. But, on the other hand, see IV S. R., 271; S. D., 1858, 886.

(*b*) H. C., 17th September, 1862, quoted in note to *Trylochurn Chowdhry*, 1st April, 1864. *Ramjoy Singh*, H. C., 24th April, 1866.

(*c*) *Ram Lochan Dutt*, H. C., 13th July, 1861, *Trylochurn Chowdhry*, H. C, 1st April, 1864.

(*d*) S. D., 1853, 130. See 1853, 618.

(*e*) S. D., 1852, 226.

may hold some sub-tenure from that under-tenant (*a*). When Government commenced an enhancement suit, and *pendente lite* restored the estate to the *zamindar*, he was allowed to carry it on (*b*).

As to joinder of claims, it was held that a suit for arrears at an enhanced rate, based upon a *kabuliyat* which it was sought to set aside, was multifarious (*c*). But a suit for declaration of right to enhance, and for arrears at the enhanced rate, will lie (*d*).

As to the evidence for the plaintiff, the general rule is that the *onus* of proving non-liability to enhancement rests on the tenant (*e*). Thus, if the tenant sets up a *mukarrari* title, it is for him to prove it (*f*). But in some cases the *onus* is by law thrown on the landlord. By Section 51, Regulation VIII, 1819, *taluks* existing in 1790 are not to be subjected to enhancement till the landlord has proved the matters specified in that Section (*g*). Similarly, when rates of rent have been recorded in a settlement under Section 9, Regulation VII, 1822, the *onus* of proving a case for enhancement rests on the landlord (*h*). And inasmuch as Section 5, Act X, declares that the former rent paid by an occupancy *ryot* shall be deemed "fair and equitable" till the contrary is proved, the *onus* of proving the grounds for enhancement lies on the landlord (*i*). It has been decided by a

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(*a*) S. D., 1850, 459.

(*b*) S. D., 1849, 488.

(*c*) S. D., 1851, 151. See *Durga Chunder Sircar*, H. C., 20th December, 1867.

(*d*) S. D , 1856, 830.

(*e*) S. D., 1850, 251 , 1857, 1268 ; *Debi Singh*, N. W. P., 4th January, 1862.

(*f*) S. D., 1850, 603.

(*g*) VII, S. R., 378.

(*h*) *Sukhi Mon Haldar*, H. C., 25th July, 1864 ; *Zabur Singh*, N. W. P., 17th August, 1862.

(*i*) *J. Hills*, H. C., 1st August, 1864 ; *Dhar Singh*, 2nd March, 1864. The case of *Anapurna Dasya*, 8th July, 1864, was instituted before Act X came into force.

Full Bench that the *onus* is upon the landlord to prove that the enhanced rent which he demands is "fair and equitable," and the Court is not bound to take that enquiry upon itself (*a*).

The plaintiff has always been required to prove service of notice before obtaining a decree for arrears at an enhanced rate (*b*). When service of the notice is disputed, the evidence of the serving officer must be taken, and an opportunity given to the defendant to cross-examine him (*c*). But it has been ruled in several cases that, even though the plaintiff fails to prove service of notice, he is still entitled to a declaration of his right to enhance (*d*). In another case, in which the notice was informal, a decree was given declaring the landlord's right to enhance upon service of a proper notice (*e*). But in other cases it is said that if the notice be informal, no decree can be made as to the prospective liability of the defendant (*f*). Omission on the part of the defendant to plead the informality of the notice amounts to a waiver of the informality (*g*). Any objections to the notice must be put forward in the Court of first instance; they cannot be taken up for the first time in appeal (*h*).

(*a*) *J. Macdonald*, 14th June, 1865, F. B.; S. D., 1852, 120. See *Polin Behari Sen*, H. C., 31st January, 1868, F. B.

(*b*) S. D., 1851, 318; VII S. R., 315; *Barodakant Rai*, H. C., 29th November, 1865; *Krishtomati Debya*, 12th July, 1865; *Chunga Ryus*, N. W.P., 7th January, 1863; *Hemanchal*, 12th January, 1863; *Shusahai*, 9th September, 1863.

(*c*) *Kashi Nath Dey*, H. C., 19th July, 1866.

(*d*) S. D., 1855, 279; 1858, 318, 1001, 1800; 1859, 832; 1860, 225; *H. Poulson*, H. C., 10th February, 1863; *Harihar Mukherjya*, 1st June, 1863, F. B.

(*e*) *Ram Lochan Dutt*, H. C., 13th July, 1864; *Chunder Kumar Rai*, 12th July, 1864.

(*f*) *Ishwar Chunder Ghosal*, H. C., 28th August, 1864; *Rada Moni Dasya*, 20th July, 1864.

(*g*) *Gungadhur Senapati*, H. C., 9th August, 1862.

(*h*) *Ramzan Ali*, S. D., 17th February, 1861.

It is sufficient if the plaintiff prove the existing rates, as proof of former rates is superfluous (*a*). A general customary rate is not proved by the statements of two individual *ryots* (*b*). If the propriety of the rate be contested, it must be proved by the production of specific instances of actual payments of such rate by *ryots* of a similar class (*c*). *Ex-parte* summary decrees, made without a previous local enquiry, are no evidence at all of prevailing rates (*d*). But ordinary decrees fixing the rates of rent for adjacent lands are evidence, though not conclusive evidence, of the prevailing rate (*e*). But in a suit for enhancement, on the ground of increased value of the produce, a decree fixing the rates of rent for adjacent lands is no evidence at all of what may be "fair and equitable" for the lands in suit (*f*). Enhancement can only be decreed on one of the grounds stated in the notice (*g*).

As to local investigations, the Sudder Court ruled that it was wrong to direct an *Amin* to fix the rates, that being a judicial duty which cannot be delegated (*h*). In a recent case it was said that it is wholly in the discretion of the Collector to make a local enquiry, and that it is open to him to fix the rent without such enquiry (*i*). A former decree as to the defendant's rent is evidence, but may be rebutted by proof of change (*j*); a

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(*a*) S. D., 1851, 620; 1852, 120; *Bhola Nath Ghose*, H. C., 13th August, 1864.

(*b*) *Probhu Dass*, H. C., 14th March, 1864.

(*c*) *Lukman*, N. W. P., 15th July, 1865

(*d*) *Anapurna Dasya*, H. C., 8th July, 1864; *Roma Nand Mundul*, S. D., 27th March, 1862; *Nara Hari Mohunt*, H. C., 12th August, 1862.

(*e*) *J. Kenny*, H. C., 29th September, 1864.

(*f*) *Sriram Bhuttacharjya*, H. C., 9th August, 1865.

(*g*) *Pancham Singh*, N. W. P., 6th April, 1864.

(*h*) S. D., 1856, 665.

(*i*) *Purna Prosad Rai*, H. C., 1st December, 1864. See *J. Macdonald*, 26th January, 1865.

(*j*) *Salik Ram*, H. C., 30th June, 1864, *Chunder Kumar Rai*, 24th June, 1864; *Kanah Mani Debya*, 6th July, 1865.

Collector's finding as to the rate of rent in *butwarra* proceedings is not conclusive (*a*).

As to the pleas of the defendant.—When the defendant contented himself with standing on his alleged *mukarrari* title, and took no exception to the rates claimed, he was held to have admitted the correctness of the rates (*b*). But such mistake in pleading would not entitle the plaintiff to recover more than a fair and equitable rent (*c*), as the Courts are not warranted, even on the waiver of the parties, in dispensing with the requirements of a positive law (*d*). In one case it was said that when the defendant sets up a *pottah* which he fails to prove, it being found to be a forgery, he is not to be allowed to fall back on a right of occupancy at fair rates (*e*), nor on the presumption from twenty years' payment at a uniform rate (*f*). In a recent case, however, it was decided that a tenant who fails to prove a *pottah* is entitled to fall back on his title to hold as an occupancy *ryot* at fair and equitable rates (*g*). The sending an agent to settle the rent cannot be construed as an admission or acquiescence in the rates claimed by the landlord (*h*).

As to the decree, it has been ruled that it is not necessary to fix a specific rent on each portion of land. It is sufficient to fix an average rate on the whole (*i*). The rate of rent must not be left to be determined in execution of decree (*j*). Ordinarily,

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(*a*) *Paltu Singh*, H. C., 30th July, 1862; *Girdhur Singh*, 30th July, 1863; *Beni Madhub*, 6th September, 1865.

(*b*) S. D., 1849, 1243.

(*c*) II Knapp, 85. S. D., 1848, 537, 834. See *Raushan Singh*, H. C., 4th January, 1868.

(*d*) S. D., 1849, 487.

(*e*) *Guru Dass*, H. C., 31st March, 1864.

(*f*) *Omesh Chunder Biswas*, H. C., 8th June, 1864.

(*g*) *Ishwar Chunder Dass*, H. C., 10th September, 1866, F. B.

(*h*) *J. Stalkartt*, H. C., 19th July, 1864.

(*i*) *Gurudass Rai*, H. C., 11th February, 1864.

(*j*) S. D., 1857, 214. *Hara Sundari Debya*, H. C., 6th December, 1862.

the enhanced rate should be decreed from the commencement of the year following that in which notice was issued; but it seems that if there has been great delay in suing, it can only be awarded from date of effective demand by suit (*a*). But the landlord is not bound, under all circumstances, to demand the enhanced rent in the first year after notice (*b*). If a decree for enhancement has remained unexecuted for a long time, suit for arrears at the enhanced rate will not lie without a fresh notice (*c*). The Agra Revenue Board, in their rules, remark that great diligence and care is requisite in investigating the distinctions of different classes of soil and different classes of cultivators. Advertence should be given to the previous history of the holding, to previous variations in the rent; to the length of time during which the present rent has been paid; to the crops grown on the land, and any proceedings at the settlement, or otherwise, bearing on the rent (*d*). A decree for enhancement, conditional on the landlord supplying manure, is informal (*e*). A suit to convert rents paid in kind into money rents will lie (*f*). In a suit for enhanced rent, a decree cannot be given for arrears at the old rate (*g*).

III.—Right to Kabuliyat, and mode of enforcing it.

By Section 9, Act X, "every person who grants a *pottah* is entitled to receive from the person to whom the *pottah* is granted a *kabuliyat* or counter-part engagement in conformity with the terms of the *pottah*. The tender to any *ryot* of a *pottah*, such as the *ryot* is entitled to receive, shall be held to entitle the person

(*a*) *Poshan Sing*, H. C., 25th November, 1862.

(*b*) *Rahimudin*, H. C., 13th December, 1864.

(*c*) III S. R., 200; S. D., 1853, 416; 1858, 611; *Govind Chunder Dutt*, H. C., 15th January, 1866; *Jadu Singh*, 6th December, 1864.

(*d*) Rule 10.

(*e*) *Kesri Singh*, N. W. P., 12th April, 1865.

(*f*) *Thakur Pershad*, H. C., 10th July, 1867.

(*g*) *Haranath Rai*, H. C., 14th June, 1866.

to whom the rent is payable to receive a *kabuliyat* from such *ryot*." And by Clause 1, Section 23, "all suits for the delivery of *kabuliyats*, and for the determination of the rates of rent at which such *kabuliyats* are to be given," are cognizable solely under Act X (*a*).

Relation of landlord and tenant.—It appears to be a settled rule that suit for a *kabuliyat* will lie only when the relation of landlord and tenant already exists between the parties (*b*). It is not a means of compelling a man to become a tenant, but only a method by which the rights of the parties in a pre-existing tenancy may be adjusted and recorded. In a suit for a *kabuliyat*, it must be shown that a contract, express or implied, exists by which the relation of landlord and tenant has been already created (*c*). In one case, in which there had been a rent-free holding for a long time, the Court said that "when it is shown that the defendant has never held the position of a tenant, nor occupied the land in such a way as to render him heretofore liable for the rent, then a suit for rent or a *kabuliyat* will not lie" (*d*). Before suit for a *kabuliyat* for land hitherto held rent-free will lie, the right to assess the land must be separately established (*e*). The fact of the defendants being in possession of lands under apparently genuine deeds, when no previous payment of rent was shown, was held sufficient to bar suit (*f*). But when

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(*a*) Formerly suits for *kabuliyats* were brought under Section 5, Regulation IV, 1794, and Sections 9 and 10, Regulation V, 1812. Construction 297. Suits for declaration of right to enhance rent were not infrequent See *Jaisukh*, N W. P., 31st March, 1863.

(*b*) *Ramkant Chowdhry*, H. C., 7th April, 1864, F. B.

(*c*) *Gopi Mohun Ghose*, H. C, 3rd December, 1863; *Jai Mungal Singh*, 16th December, 1864, *Purna Dass*, H. C., 22nd May, 1865, *Hari Prasad Mutti*, 19th August, 1862.

(*d*) *Muhammad Mirjanat-ul-Huk*, H. C, 12th August, 1864.

(*e*) *Gumani Kazi*, H. C., 1st June, 1863, F. B. But see *Krishto Mohan Patur*, H C., 7th March, 1867, and *Madhub Jana*, 25th January, 1867.

(*f*) *Matangini Debya*, H. C., 18th March, 1864.

a resumption decree has been given against a *lakhirajdar*, and he remains in possession knowing his liability to pay rent, a suit for a *kabuliyat* will lie against him (*a*). If the land has been legally resumed, the mere fact of rent never having been paid is no bar to a suit for a *kabuliyat* (*b*). The resumption by Government of *lakhiraj* land, and the settlement of such land by the Collector, of itself creates the relation of landlord and tenant between the Government farmer and the holder of the land (*c*). The Agra Court have ruled that when a *kabuliyat* is claimed on account of land alleged to have been resumed, the legality of the resumption may be enquired into and decided (*d*). When one sharer sued another for a *kabuliyat* on account of land in the personal occupation of the latter, and the defendant pleaded a purchase of the entire proprietary right, which plea was found to be false, the Court said he could be holding only as a tenant, and decreed a *kabuliyat* (*e*). Suit for *kabuliyat* will lie against ordinary squatters, as, by the custom of the country, an implied contract of tenancy may be presumed in these cases (*f*). But if a tenant under a lease cultivates land in excess of his lease, he becomes a trespasser, and cannot be sued for a *kabuliyat* in respect of the excess lands (*g*). If, however, the lease gives no boundaries this ruling does not apply (*h*). And of course suit for a *kabuliyat* would lie against an *utbandi* tenant, the main condition of whose tenancy is that he shall cultivate different lands each year. There are two contradictory decisions as to whether

(*a*) *Jai Kissen Mukherjya*, S. D., 13th July, 1865.

(*b*) *Umrao Begum*, N. W. P., 23rd June, 1864.

(*c*) *Hara Prasad Rai*, H. C., 21st December, 1866.

(*d*) *Kadim Ali*, N. W. P., 20th December, 1865, F. B.

(*e*) *Guru Prosuna Rai*, H. C., 26th August, 1864.

(*f*) *Nitya Nand Ghose*, H. C., 20th June, 1864; *D. David*, 15th December, 1866. In the latter case it was said the landlord has the option of suing to eject them as trespassers, or suing them as tenants for a *kabuliyat*.

(*g*) *Rosham*, H. C., 29th August, 1866

(*h*) *Syam Jha*, H. C., 4th February, 1867.

suit will lie for a *kabuliyat* on account of *jalkar* (*a*), though the point would seem to be clear enough.

Kabuliyat to and from assignees.—The purchaser of a *zamindari* is not, as a matter of course, entitled to sue a *putneedar* for a fresh *kabuliyat*, as the original one is quite sufficient. If it has been lost, it may be that, upon proper allegations and evidence, and possibly upon a sufficient indemnity being given, the assignee may be entitled to sue for a fresh *kabuliyat* (*b*). But if only a portion of the *zamindari* be sold, the purchaser may claim a *kabuliyat* for the corresponding portion of the *putnee* (*c*). By Section 17 of Act VIII, 1865, B. C., if the purchaser of a tenure sold under that Act does not register his name, the landlord may sue him for a *kabuliyat*.

Kabuliyats at enhanced rates.—When the *kabuliyat* is claimed from a tenant without right of occupancy, it is not necessary to state the fact that it is claimed at enhanced rates, or the ground on which enhanced rates are claimed (*d*). But if the *kabuliyat* be claimed at enhanced rates from an occupancy *ryot*, the legal ground of enhancement must be fully disclosed (*e*). Since by Section 8, Act X, *ryots* without rights of occupancy can claim *pottahs* only at such rates as are agreed upon between them and their landlord, suit for *kabuliyat* will not lie against such *ryots* till the rates have been agreed on (*f*).

Fixing the term.—In a suit for a *kabuliyat* against an occupancy *ryot*, the rent cannot be fixed for a term of years, as it can

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(*a*) *Mohun Govind Sen*, H. C., 18th December, 1866, *Kailas Chunder Dey*, 29th January, 1867. See Clause 4, Section 23, Act X.

(*b*) *J. Beckwith*, H C., 26th September, 1864.

(*c*) *Rykishto Mukherjya*, H. C., 18th November, 1865. But ordinarily suit will not lie for a *kabuliyat* for a portion of a holding, *Abdul Ali*, H. C., 27th November, 1867.

(*d*) *Cohn, Feilman and Co.*, S D, 14th June, 1862; *Jan Ali*, H. C., 5th January, 1864.

(*e*) *Amrit Lall Bose*, 19th December, 1865.

(*f*) *Ram Manik Chuckerbutty*, H. C., 16th December, 1865.

be under Section 76 in a suit for a *pottah*. The difference of the two cases is that a right of occupancy is the right of the ryot, not a power in the landlord to compel him to hold on (*a*). But in the case of *Thakurani Dasya*, it is said the term can be fixed, the tenant having a right to surrender his tenancy at any time (*b*).

Tender of a pottah.—Is an essential preliminary to suit for *kabuliyat*. In one case it was said—"upon the plain language of the Section it seems clear that the terms of the holding must be settled, and a *pottah* embodying such terms must be drawn up and actually tendered to the *ryot* before the landlord can claim a *kabuliyat*" (*c*). But it is sometimes said that institution of suit for a *kabuliyat* is of itself evidence of a *kabuliyat* having been tendered (*d*). And it has also been ruled that when the suit is for determination of rates as well as for a *kabuliyat*, it is not necessary to prove previous tender of *pottah*, because the landlord is not in a position to do this till the rates have been determined (*e*). The objection that no *pottah* was tendered is not allowed to be raised for the first time in appeal (*f*). Suits for *kabuliyats* will lie against middlemen as well as *ryots* (*g*).

As to the plaint—It has been held that it should contain such a specification of the boundaries as to identify the lands (*h*). The suit should apparently be valued (under note (b) (1), Article 11, Schedule B, Act XXVI, 1867) at the amount at which the plaintiff chooses to estimate it.

(*a*) *J. Hills*, H. C., 2nd September, 1863.

(*b*) H. C., 19th June, 1865.

(*c*) *Ramkant Chowdhry*, H. C., 11th July, 1864. See *Govind Lall Seal*, 1st April, 1868; *E. C. Mudhusudon Chowdhry*, 28th November, 1867.

(*d*) *Jai Kissen Mukherjya*, S. D., 31st March, 1862.

(*e*) *Nitya Nand Ghose*, H C., 20th June, 1864. But there is nothing to hinder him from tendering a *pottah* at what he deems fair rates.

(*f*) *Durga Kant Muzumdar*, H. C., 5th April, 1864.

(*g*) *R. Watson*, H. C., 3rd February, 1866.

(*h*) *Mudun Mohun Banneryya*, H. C., 25th July, 1864.

As to the defendant's pleas.—When the defendant pleaded he was a co-sharer in the estate, but admitted having given a *kabuliyat* for a portion of the land, the *onus* of proving his plea of proprietary right rested upon him (*a*). When a plea of fixed rates is raised, the issue to be tried is under Section 4, Act X (*b*). In one case the plea that the land was held under an *istimrari pottah* was held to be a valid answer to a claim for a *kabuliyat*, as the title might be endangered if a new *kabuliyat* were given (*c*).

Intervenors may appear and be heard under Section 77, Act X, in these suits (*d*).

As to the decree.—By Section 81, Act X, if after decree the defendant shall refuse to execute a *kabuliyat*, "a copy of the decree under the hand and seal of the Collector shall be of the same force and effect as a *kabuliyat* executed by the person ordered to execute it." Conditions for sale of the tenure, under Regulation VIII, 1819, cannot be inserted in *kabuliyats* given under decree (*e*).

IV.—RIGHT OF MEASUREMENT, AND MODE OF ENFORCING IT.

By Section 9, Act VI, 1862, B. C.—"Every proprietor of an estate or tenure, or other person in receipt of the rent of an estate or tenure, has a right of making a general survey and measurements of the lands comprised in such estate or tenure, or any part thereof, unless restrained from doing so by express engagement with the occupants of the lands." If the occupants of the land oppose the measurement, or if tenants refuse to attend after notice and point out the land, application may be made to the Collector, who will pass an order allowing

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(*a*) *Guru Prasad Rai*, 5th August, 1862.

(*b*) *Asghur Ali*, H. C., 23rd June, 1864.

(*c*) *Durgá Kant Muzumdar*, H. C., 5th April, 1864.

(*d*) *Khya Meshuri Debya*, H. C., 8th July, 1864, *Manik Mundul*, 4th August, 1863

(*e*) *Buzurg Chamar*, H C., 1st July, 1864.

or disallowing the measurement, and enjoining, or excusing the attendance of the tenants, and if, after such order, they fail to attend, they cannot afterwards contest the measurement.

Who may measure.—In a recent case it was ruled that this right appertains to all proprietors of "estates" and "tenures" (*a*), and therefore it is not necessary that the relation of landlord and tenant should exist between the parties. In this case the proprietor was allowed to measure a *bekhbirt taluk* comprising twenty-one villages, and held at a fixed rent; the Court holding that neither the size of the tenure nor the fixity of the rent barred the right of measurement (*b*). The right may be exercised by the lessee of an estate under the Court of Wards, as he is a "person in receipt of the rents of an estate (*c*), and also by the owner of a fractional share in a joint undivided estate (*d*). The proprietor of the parent estate may measure lands comprised in an under-tenure (*e*). It is not indispensable to prove previous receipt of the rent if possession be otherwise satisfactorily proved (*f*). A proprietor who has farmed his estate may measure (*g*).

Rulings as to measurement.—The previous consent of the *ryot*

(*a*) By Section 13, Regulation VIII, 1800, amending Section 3, Regulation XLVIII, 1793, the term "estate" includes any *malguzari* land for the discharge of the revenue of which a separate engagement has been entered into with Government, or which may have been separately assessed with revenue, though no engagement may have been executed to Government. "Tenure" is used of all tenancies in perpetuity, whether held by middlemen or *ryots* at a fixed rent, or at a rent subject to enhancement under fixed rules as opposed to farms and leases for a term. In English law tenure means "manner of holding," and here the holding itself, whether rent-paying or rent-free.

(*b*) *Ram Bahadur Singh*, H. C., 8th July, 1867.

(*c*) *R. Watson*, H C., 7th July, 1864?

(*d*) *Sambhu Chunder Sadhu*, H. C, 30th August, 1864 (?)

(*e*) *Anand Mohun Banerjya*, H. C., 15th September, 1865.

(*f*) *Raj Chunder Rai*, H. C., 2nd September, 1865.

(*g*) *Kristomoti Debya*, H. C., 28th January, 1868. *E. C.*

is not necessary (*a*). No length of possession, or any other plea than that of an express restriction by contract, can bar the right (*b*). A measurement by the Collector at the time of settlement is no bar to a re-measurement by the proprietor (*c*). An under-tenant or *ryot* is not bound by a measurement made in his absence, and of which no notice was given him (*d*). The *onus* of proving a right to exemption from measurement lies wholly on the tenants (*e*). One suit will lie against any number of tenants contesting the proprietor's right to measure (*f*). In one case a single suit was allowed against the *ryots* in two villages (*g*). Intervenors, under Section 77, may be heard in these suits (*h*). The appeal lies to the Judge under Section 10 (*i*). Under the old law (Clause 8, Section 15, Regulation VII, 1799), tenants resisting measurement might be sued for damages (*j*). A suit for demarcation of a *Shikmi taluk*, the lands of which were mixed up with those of an independent *taluk*, was held to lie in the Civil Court (*k*).

Pergunnah pole.—By Section 11, Act VI, 1862, B. C., all measurements, made under that Act are to be made by the standard pole of measurement of the *Pergunnah* in which the land is situated. If there is a dispute as to this, it must be ascertained by judicial enquiry (*l*). In such an enquiry the *Kanango's* papers filed

(*a*) S. D., 1851, 8.

(*b*) *Uma Churn Biswas*, H. C., 6th June, 1867.

(*c*) VI S. R, 171.

(*d*) *Jadub Chunder Haldar*, H. C., 14th May, 1863.

(*e*) S. D., 1846, 223.

(*f*) R. S. C., 31st January, 1842; S. D., 1852, 800; *Shoshi Bhusan Banerjya*, H. C., 24th June, 1867. See Smith's Equity, 412.

(*g*) *R. Solano*, H. C., 15th June, 1866.

(*h*) *Haradhan Dutt*, H. C., 29th June, 1866; *Nando Lall*, 22nd Feb., 1867.

(*i*) *J. Smith*, H. C. 29th June, 1866.

(*j*) VII S. R., 263.

(*k*) *Jagut Tara Chowdhrain*, H. C., 25th July, 1865.

(*l*) *Hara Mohun Mukherjya*, H. C., 18th August, 1864; *Ramesh Churn Dutt*, 19th August, 1864.

in the Collector's office are of great weight (*a*). A *hath* or cubit is not always eighteen inches in length, but varies in different *pergunnahs* (*b*). There may be more than one standard of measurement in a *Pergunnah* (*c*). The *Pergunnah* pole or rod (which is called *nal* and *lagi*) contains various numbers of *haths*, and as the rod varies, so does the *bigha*. The rod squared gives one *gandah*, 20 *gandahs* give one *katha*, and 20 *kathas* one *bigha*. The standard Bengal rod is 4 *haths* or 6 feet long. 6 × 6 or 36 square feet make a *gandah*, 20 *gandahs* or 720 square feet make a *katha*, and 20 *kathas* or 14400 square feet or 1600 square yards make a *bigha*. The standard Behar rod contains 3 *Illahi gaz* or yards of *Akbar's* standard of 33 inches each, *i. e.*, 99 inches or 5½ *haths* or 8¼ feet. The *gandah* is therefore 68 square feet and a fraction; the *katha* 1361 square feet and a fraction; and the *bigha* 27227 square feet, or 3025 square yards. This was the *bigha* used in the Revenue Survey of the North-West Provinces, and it is considered to be equal to *Akbar's bigha* of 3600 *Illahi gaz* (*d*). It is alleged by *zamindars* that a rod of 7½ *haths* or 11¼ feet was used in Behar at the time of the Decennial Settlement, which gives a *bigha* of 6325 square yards (?) The Cuttack *bigha* is considered to be nearly equal to the English statute acre of 43560 square feet or 4840 square yards. If there is a recognised standard of measurement in a territorial division less than a *Pergunnah*, measurement should be made

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(*a*) *Nand Dhanpat*, H. C., 12th January, 1865.

(*b*) S. D. A *hath* is the length from the elbow to the tip up the middle finger, usually 18 inches, but sometimes 19¼, and even more.

(*c*) *Bhagabuti Churn*, H. C., 26th November, 1864.

(*d*) The Eastern Bengal land is measured by *droons* and *kanis*. A *droon* generally consists of 16 *kanis*, but the size of the *kani* varies from a little over 4 to about 40 *bighas*. The usual size is 4 *bighas* and a fraction. *Ryotti* holdings are measured with a shorter rod than *Howalas* and *Abadkari taluks*:—*e. g.*, the *ryotti kani* is often measured with a rod of 14 cubits, while *Howalas* are measured with one of 16 cubits. *Howaladars* also get a deduction of two *gandas* in the *kani*, called *matan*.

by it within the division (*a*). The Collector's decision as to the length of the pole is final (*b*).

Mode of measurement.—Measurements are usually made in the month of *Magh*, *Phalgun*, *Chait*, and *Bysakh*, as the land is generally clear of crops at that time. When the old *chitthas* are not forthcoming, the measurement is commenced *de novo*, and is called an *eksan jarib*. If the old *chitthas* are in existence, the measurement is made according to them, and this is always considered the most correct. Sometimes the land is merely compared with the old *chitthas*, and this is called a *namuda*. The measurement is begun at some conspicuous place, such as a tank; and that being noted, the next parcel of land or *dag* is numbered, and is stated to be north or south of the tank, as the case may be; and so on, to the end. In the *Amin's* field book the numbers follow each other in order; but when the *chitthas* are made out, the land is arranged into the different *mehals* of *Ryoti*, *Khamar*, *Debutter*, &c Thus numbers 1 and 2 may fall in the *Ryoti Mehal*, 3 and 4 in the *Debutter*, and so on. The words *Todu*, *Todo*, *Topu*, *Topo* are used in *chitthas* for north, south, east, and west; and *Dendu*, *Dendo*, *Denpu*, *Denpo*, (and sometimes *Dihda Dihdo*, &c.,) are used to signify that there is a parcel of land between the number last mentioned and the next *dag*. For instance, "*Baidnath* No. 7, three bighas *Shali*, *Dendo* of that No. 8, means that No. 8 lies just south of the plot south of No. 7" (*c*).

The Goshwara gives the gross quantity of land shown on the *chitthas*, showing the total amount of each quantity (*d*).

The Khateryan, sometimes called *Mantakhab*, is a list of the tenants, with all the different plots of land held by each, and references to the *chittha* number in which they are recorded.

(*a*) *Survanand Pandy*, H. C., 21st November, 1865.

(*b*) *Tarakh Nath Mukherjya*, H. C., 1st February, 1866; *Rakhal Dass Moitre*, 8th March, 1867.

(*c*) Smyth, 2.

(*d*) Smyth, 21.

It is of great use in settling boundary disputes amongst the *ryots*, as it enables the entries of the plots to be at once found in the *chitthas*, which give the length, breadth, and bearing of each plot (*a*).

The Ekwal gives the gross amount of land in the possession of each tenant, with a detail of the cultivation (*b*).

The Tirj, or abstract *Khateryan*, shows the total gross amount of land in each *ryot's* possession, and the details of the cultivation (*c*).

Measurement by Collector.—When a proprietor is unable to measure on account of inability to ascertain who the tenants are, by Section 10, Act VI, 1862, B. C., he may apply to the Collector, who, "on the necessary costs being deposited, shall proceed to measure the land, and to ascertain and record the names of the persons in occupation of the same; or, on the special application of the proprietor or other person aforesaid, but not otherwise, shall proceed to ascertain, determine, and record the tenures and under-tenures, the rates of rent payable in respect of such lands, and the persons by whom respectively the rents are payable." If the Collector shall be unable to do this, he may declare the tenures to have lapsed to the proprietor. On the tenant appearing within fifteen days from the date of this order, the case may be reheard. An appeal lies to the Judge. It has been ruled by the Board that this Section does not empower a Collector to alter rents. He can only prepare a *jama bandi* or rent roll of the rents actually paid (*d*).

V.—Waste.

The doctrine of waste has been applied to the case of a mortgagee (*e*), and to persons holding life estates, such as Hindu widows; but there are few reported cases as to its applicability

(*a*) Smyth, 29.
(*b*) Smyth, 40.
(*c*) Smyth, 48.
(*d*) Board's Rules, Chapter XVI, Section IX.
(*e*) IX, N. W. P., 1, VII, 136.

to the case of landlord and tenant. In English law, waste is a diminishing the value of the property, an increasing of the burden upon it, or an impairing of the evidence of title (*a*). It is either "voluntary," which consists in doing something the tenant is prohibited from doing by law, or "permissive," which consists in allowing something to happen which he is bound by law to prevent (*b*). No doubt the landlords in this country have a right that their property shall be treated and cultivated in a proper manner while it is out of their possession, and it is probably owing to the fact that the usage is so well understood, that there are so few cases on the subject. What cases there are will be given under the head of "Breach of Conditions of Tenancy" in Chapter V., as the subject usually comes into notice in connection with suits for ejectment on that ground.

(*a*) Smyth, 193, *note*.
(*b*) Smyth, 192.

CHAPTER IV.

CONTINUANCE OF TENANCY. RIGHTS OF TENANTS.

The rights of the tenant against his landlord during the continuance of the relation of tenancy are the following.—

(1). The right to quiet possession of the land.

(2). The right to receive a *pottah.*

(3). The right to abatement of rent in certain cases.

(4). The right to receive receipts for rent paid.

(5). The right to immunity from extortion of rent by duress.

(6). The right to immunity from exaction of excess rent.

(7). The right to hold lands annexed to the tenure by alluvion.

Right to Quiet Possession.

General rule—"The lessor, it is said, in the absence of express agreement, is bound to maintain his tenant in the peaceable and quiet possession of the property demised to him. This implied obligation, on the part of the landlord, to protect his tenant in the possession and quiet enjoyment of the premises, extends to guarantee the tenant against evictions and disturbances caused by the landlord himself, or by any persons claiming paramount to him, or under him; for it is obvious, to sound reason and common sense, that if one man demises property to another, he ought to take care that he has himself a right to that which he demises, and consequently that no person claiming paramount to him, (that is, by a superior title to his,) shall interfere with the enjoyment of his tenant. And, in like

manner, it is plain that he ought to take care that he has not by his own act given a title to some one to interfere with his tenant's possession. Indeed, to do so would be manifest dishonesty, for which, by every rule of justice and of common sense, he ought to be, and is, answerable" (*a*). Dispossession of the tenant in either of these ways absolves him from the liability to pay rent, and may be remedied by suit for possession.

Dispossession by parties paramount.—The Government being a party claiming paramount to the landlord, it is always held that the landlord cannot recover from the tenant the rent of land which has been taken up by Government (*b*). This rule was adhered to even in a case in which the *kabuliyat* contained a stipulation that no remission of the rent was to be claimed or allowed on the ground of diluvion, earthquake, drought, and such like casualties; the Court holding that the parties, when they entered into this contract, did not, and could not, contemplate such a contingency as a portion of the land being taken up by Government for a Railway (*c*). When land was leased to a tenant as a place whereon to deposit the carcasses of cattle, and the Municipal authorities, in the exercise of powers given them by law, prohibited such use of the land, it was held that this absolved the tenant from payment of rent (*d*). This, however, is not a case of eviction by parties claiming paramount, but was decided on the ground that the subject-matter of the contract had been annihilated by third parties acting under powers given them by law (*e*). If the eviction by the Government does not extend

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(*a*) Smith, 218.

(*b*) *Ram Kissen Dass*, S. D., 22nd March, 1862.

(*c*) *Mohesh Chandar Dutt*, H. C., 29th April, 1863. But see S. D., 1857, 476.

(*d*) S D., November, 1860, 295. See *Enayat Allee*, H. C., 5th April, 1864.

(*e*) It seems that this ground would not hold good in English law. Rent was decreed in a similar case in England when the eviction was by the Government, which is not there regarded as a party claiming paramount. —Addison on Contracts, 4th Ed., 319.

to the entire land held by the tenant, but only to a portion of it, the tenant is entitled to a proportionate abatement of his rent (*a*). When Government resumed part of a *lakhiraj* tenure as *towfir*, thereby dispossessing a tenant holding under a *mukarrari* lease from the *lakhirajdar*, the tenant was allowed a proportionate abatement of his rent (*b*). But if the tenant's possession be not disturbed, the mere fact of the superior *lakhiraj* tenure being resumed is no answer to a claim for rent (*c*).

Payments to parties paramount.—As an actual eviction by a party claiming paramount to the landlord is a good answer to a claim for rent, so also the tenant is entitled to deduct from his rent the amount of any payment he has been compelled to make to persons claiming paramount to his landlord, in order to protect himself in the enjoyment of his land. In an English case it is said—"The principle is that the compulsory payment by the tenant of ground-rent or other like charge is in truth a partial eviction; and the landlord is presumed to authorize the payment by the tenant of his rent to those who have a claim paramount to his own, and against which (as being a partial eviction) he is bound to protect him" (*d*).

Dispossession by parties claiming under the landlord.—Dispossession of the tenant by another party holding another lease of the same land from the landlord, and with the landlord's assent or connivance, absolves the tenant from his liability for the rent (*e*). When a landlord fraudulently granted a second lease of land included in a former lease, the former lessees were

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(*a*) *Din Dyal Lall*, H. C., 19th July, 1866.

(*b*) S. D., 1857, 1293.

(*c*) S. D., 1853, 621. See *Amirudin Muhammad*, H. C., 12th July, 1865.

(*d*) *Tores* vs. *Morris*, III Exch. 742, quoted in Smith, 136. But it seems a mortgagee is not considered to be a person having a title paramount to that of the mortgagor.

(*e*) *Joydeb Mahapatra*, H. C., 30th August, 1864; *Ramprasad Bhakat*, 31st July, 1863.

exonerated from paying rent in respect of the lands from which they were evicted by the subsequent lessees (*a*). So when a tenant held a lease of half a village, and the landlord supported the claim of a third party, whose title was also derived from him, to the whole village, the tenant was held to be justified in suing the landlord along with the subsequent lessees (*b*).

Dispossession by the landlord.—When the land has been attached, and a *sazawal* appointed illegally, the tenant is not liable for the rent (*c*); and this is so, even though the plea be not raised by the tenant (*d*). If a *sazawal* be retained in possession longer than the proper time, his possession amounts to an illegal eviction of the tenant (*e*). But an illegal attachment for future rents does not affect a claim for antecedent arrears (*f*). When a farm was held in attachment till the expiry of the lease, the *zamindar* could not claim the deficiency in the collections from the farmer (*g*). When a *zamindar* illegally attached a tenure, and to a great extent destroyed the crops, it was held he had lost his claim to the rent (*h*). Even when the *zamindar* had by an amicable arrangement taken on himself the responsibility of the *Mufussil* collections for one year, he could not retain the *putnee* rent on account of that year (*i*). But if the dispossession has been for a very short time, and there is no proof that the tenant was prevented from realizing his dues, no remission of the rent is allowed (*j*). Just so in English law,

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(*a*) VII. S. R., 161.

(*b*) S. D, 1856, 144.

(*c*) S. D., 1849, 70, S. D., August, 1864, 192.

(*d*) VII S. R., 471.

(*e*) S. D., 1859, 168.

(*f*) S. D., 1850, 85. And the same rule holds good in English law, Smith, 212, *note*.

(*g*) S. D., 1857, 737.

(*h*) *Ram Dyal Singh*, H. C., 30th November, 1864.

(*i*) S. D., 1853, 577.

(*j*) S D, November, 1861, 171.

a mere trespass by the lessor does not operate as a suspension of the rent (*a*). Eviction from part of the land only entitles the tenant to remission of part of the rent, though it is otherwise in English law (*b*).

Dispossession by strangers.—A landlord is not bound to guarantee his tenant against eviction by third parties (*c*). "The case is quite different," it is said, "when somebody who has no title at all, some mere trespasser, interferes with the tenant's enjoyment. In such a case he may sue and prosecute the wrong-doer without having recourse to his landlord, whom it would be unreasonable to expect to indemnify him against every wanton trespass committed by third persons" (*d*). Hence dispossession by a stranger is no answer to the landlord's claim for his rent (*e*). In one of the early English cases, when a defendant pleaded "that a German Prince, by name Prince Rupert, an alien born, had invaded the realm with a hostile army, and had entered upon his possession, and expelled him from the premises," it was decided that this was no answer to the landlord's claim for rent (*f*).

Dispossession caused by the fault of the tenant himself does not of course suspend the landlord's claim to rent. When a farmer failed to pay the rent of a *putnee* included in his farm, and the *putnee* being thereupon put up for sale, a *durputneedar* got possession of it by paying the arrear, it was held that the farmer was bound to pay the rent (*g*).

Suit for possession by tenants ordinarily lies in the Collector's

(*a*) Smith, 211, *note*.

(*b*) See I Stephen's Blackstone, 687.

(*c*) Unless there be a special covenant to that effect. See *Tumunissa*, H. C., 12th August, 1867.

(*d*) Smith, 218.

(*e*) *Mohan Mala*, S. D., 27th March, 1862, *Abdul Ghunni*, H. C., 23rd April, 1863. But see *Ram Chunder Muzumdar*, 2nd September, 1865.

(*f*) *Paradine* vs. *Janee*, quoted in Smith, 211, *note*.

(*g*) S. D., 1859, 483.

Court under Clause 6, Section 23, Act X, and the Civil Courts have no jurisdiction in the matter (*a*). But suit will not lie in the Collector's Court unless the dispossession has been the direct act of the landlord, or his servants acting under his orders. When third parties oust the tenant on the allegation of holding a lease from the *zamindar*, neither would such an allegation, nor the fact of their holding such a lease, nor any subsequent ratification of their acts by the *zamindar*, oblige the tenant to bring his suit in the Collector's Court (*b*). But if the landlord himself assists the second lessee, and so prevents the real tenant from collecting his rents, the jurisdiction of the Collector is not taken away by the second lessee being made a party to the suit (*c*). In other cases it was said that whenever the landlord acts jointly with third parties, the suit lies in the Civil Court (*d*). And as the Collector cannot give mesne profits (*wasilat*), or damages (*e*), it is the rule that when *wasilat* is claimed, the tenant is not bound to bring two suits, but may lay his suit in the Civil Court (*f*). It has been ruled by a Full Bench that when the suit is brought to try title, and is not a mere possessory action, the *venue* lies in the Civil Courts (*g*), and it is the allegation of the plaintiff which determines the Court in

(*a*) *Madhub Rai*, H. C., 12th August, 1864.

(*b*) *Jai Kissen Mukherjya*, H. C., 24th June, 1864.

(*c*) *Brijishwari Dasya*, H. C., 10th July, 1863; *Hara Chunder Ghose*, 6th April, 1866.

(*d*) *Latchmi Priya Debya*, H. C., 15th May, 1865, *Karana Mayi Dasya*, 17th February, 1864; *R. Watson*, 13th March, 1863; *Ram Saha*, 12th August, 1862.

(*e*) *Mala Rai*, N. W. P., 13th April, 1863, F. B.; *Gunga Pershad*, N. W. P., 24th June, 1865.

(*f*) *Ratan Mani Dasya*, H. C., 13th February, 1863; *Ram Lochan Dass*, 6th January, 1864. The High Court have recommended that the Collector should be empowered to give *wasilat*. See Minutes, March, 1865. See II Sev., 273; S. D., 1850, 409; 1855, 206. A surety may sue for damages. *Baroda Kant Rai*, Sutherland, P. C., 191.

(*g*) *Guru Dass Rai*, H. C., 22nd February, 1867, F. B.

which the suit shall be brought (*a*). The Agra Court, also, by several Full Bench decisions, has ruled that in all disputes between landlords and agricultural tenants respecting their rights in land, Act X gives exclusive primary jurisdiction to the Collector (*b*), and therefore that the Collector is competent to determine all such questions relating to rights and interests in land as may arise between the parties in the suits cognizable by him, and the judgment is not liable to be contested, save in appeal (*c*). Hence the Agra Court has ruled that if dispossession by the landlord has actually taken place, the suit for possession lies in the Collectorate. But if his title is simply disputed, and there has been no actual dispossession by the landlord, a suit for confirmation of title lies in the Civil Court (*d*). The Calcutta Court has decided that a suit to compel a lessor to give possession under a lease not yet acted upon lies in the Civil Court (*e*). So, too, a purchaser of an under tenure by private sale, which tenure the landlord alleges to be non-transferable, cannot sue for possession for the first time under this Section, but must bring his suit in the Civil Court, as there has been no previous possession (*f*). As to purchasers of tenures sold in execution of decree, in one case, the same rule was followed (*g*); but in another it was held that the suit was properly brought in the Collectorate, though the purchaser had never succeeded in getting possession from the first (*h*). The Calcutta Court

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(*a*) *Ram Bhajan Bhakat*, H. C., 19th July, 1866.

(*b*) *Randhan Singh*, N. W P., 31st July, 1862, F. B , *Ghauri Upadhya*, 5th August, 1863, F. B.

(*c*) *Duryai Singh*, N. W. P . 22nd April, 1865.

(*d*) *Sheodan Singh*, N. W. P , 19th May, 1865, F. B.

(*e*) *Judu Nath Ghose*, H. C , 21st November, 1864 See Smith, 207, *note*; Addison on Contracts, 4th Ed., 196.

(*f*) *Kanhai Mulla*, H C., 15th August, 1865 , *Moheshur Buksh*, N. W. P , 26th September, 1864.

(*g*) *Jaya Bandhu Mullik*, H. C , 15th August, 1864.

(*h*) *Jagambari Debya*, H. C., 10th June, 1864.

has ruled that the heirs of a deceased *ryot* who has never been in possession since his father's death, and whose title is devised by the landlord, cannot sue under this Section, as the Collector cannot try a question of heirship (*a*). On the other hand, when a *ryot* claimed to succeed to a deceased brother's holding, the Agra Court decided that the suit was properly brought in the Collectorate, as the landlord, by withholding possession, had constructively ousted the tenant (*b*), and in another case they ruled that in any dispute involving occupancy by heirship, the question of hereditary right must be determined (*c*). When mortgagees of *ryots'* tenures are actually in possession, and are dispossessed by the landlord, the suit for possession lies in the Collector's Court (*d*)

As to the persons who may sue, it has been held that the holder of a transferable *shikmi taluk* may sue under this Clause (*e*) Any tenant who has held possession may sue, though he may not have a right of occupancy (*f*). *Benami* purchasers of tenures may sue, provided they have held possession (*g*). But in a former case it was said that the master cannot sue when the lease stands in the name of a servant (*h*). In one case it was said that no suit lies against a sharer in a joint undivided estate when the tenant has been placed in possession without his consent (*i*); and in another case it was

(*a*) *Hari Churn Lushkar*, H C., 14th April, 1863.

(*b*) *Ramdhan Singh*, N. W. P., 31st July, 1862 This view is corroborated by Section 6, Act X, which makes the holding of the father equivalent to the holding of the heir.

(*c*) *Beni Lall*, N. W. P., 12th May, 1864.

(*d*) *Ghansi Upadhya*, N W. P, 5th August, 1863, F. B, *Chanhaaiya Dyal Tewari*, N. W. P, 20th May, 1864

(*e*) *Raj Chunder Surma*, H. C., 29th July, 1864

(*f*) *R Watson*, H C., 10th April, 1863, *Sukhawat Hosain*, 12th May, 1863, *Karuna Mayi Dasya*, 17th February, 1864, *Taj Bebi*, 23rd June, 1864.

(*g*) *Sharanati Dasya*, H C., 23rd April, 1863.

(*h*) VII S R., 481.

(*i*) *Ganesh Ram Singh*, H C., 5th December, 1865.

said such a suit does lie (*a*). Holders of *muaafi* or rent-free tenures cannot of course sue under this Section (*b*). The Agra Court has ruled that tenants holding leases of *Bankar*, *Ghaskar*, &c, cannot sue for possession under this Clause, as such tenancies do not come within the meaning of "land, farm, or tenure" mentioned in Clause 6, Section 23 (*c*). One *putteedar* ousted from his *sir* land by another *putteedar* cannot sue under this Section (*d*).

As to the persons who may be sued under the old law, when a succeeding farmer adopted and justified the act of his predecessor in ousting a *ryot*, he was held liable (*e*). When a tenant had been ejected by a single sharer in a joint undivided estate, the Court ruled that all the sharers should be made parties to the suit, as the interests of all would be affected by the decree (*f*). Possession has been decreed as against a lessor who granted a *talúk* collusively to avoid a decree (*g*).

As to the form of the plaint.—Section 41, Act X, provides that it must describe the extent, situation, and designation of the land, and, if necessary for its identification, the boundaries must be given. When a suit was brought for possession of plots of land described as within larger plots, the boundaries of which were given, the description was held insufficient (*h*). In a case under the old law, it was held unnecessary to specify the boundaries of a known *hawala* tenure (*i*).

The period of limitation is one year from the date of the

(*a*) *Lukhan Shai*, H. C., 7th June, 1866. See Chapter II, under "Sharers."

(*b*) *Abbas Bakshi*, N. W. P., 9th January, 1864.

(*c*) *Ram Narain Juti*, N. W. P., 1st March, 1864; 18th August, 1866, F. B.

(*d*) *Pophi*, N. W. P., 13th May, 1864.

(*e*) S. D., 1853, 301.

(*f*) S. D., 1850, 371.

(*g*) VII S. R., 341. See S. D., 1851, 774, for the principle.

(*h*) S. D., 1850, 43.

(*i*) S. D., 1852, 800.

cause of action, and no extension of time will be allowed on account of the suit having been first brought in the wrong Court (*a*). Though the dispossession of the different parts of a tenure had taken place at different times, one suit was allowed (*b*).

As to the evidence of the plaintiff, it must be shown that he is the tenant of the defendant under an unexpired tenancy (*c*), and that he has held possession, and has been illegally ejected (*d*). Proof that the plaintiff has taken land without permission, and sown a crop on it, is not sufficient, for it is open to the landlord to eject a trespasser (*e*). It must be proved that the ejectment was illegal, for a decree for possession cannot be given, irrespective of the fact of possession and illegal ejectment (*f*). When a tenant, holding on after the expiration of his lease, was ejected by the landlord because he refused to pay a higher rent, the Court said if he was violently ejected, that entitled him to a remedy, but not to reinstatement, as he could show no right to the tenancy (*g*). The mere fact that the ejecting landlord has not received his *pottah* at the time, does not make the ejectment illegal (*h*). An ejectment may be illegal as between the parties, even when effected by the Magistrate (*i*). In one case it was said that disturbing and dispossessing the *ryots* is equivalent to a dispossession of the farmer

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(*a*) *Kali Prosaud Sen*, H. C., 17th February, 1864.

(*b*) S. D., 1853, 151.

(*c*) *Madan Khan*, H. C., 27th March, 1863, *Srestidar Muzumdar*, H C., 11th January, 1867.

(*d*) *Chunder Sikar Deb*, H. C, 8th July, 1864.

(*e*) S. D., 1853, 53; *Srestidhar Muzumdar*, H C., 11th January, 1867.

(*f*) *Pitamber Mulherjya*, H. C., 4th August, 1863.

(*g*) *Raghu Nandan Singh*, H. C, 27th September, 1864, *Sha Ratan Singh*, 11th May, 1864.

(*h*) *J. Morell*, H. C., 3rd December, 1863.

(*i*) *Bhagwath Chunder*, H. C, 5th December, 1861, *Moti Latchmi Debya*, 25th April, 1864.

to whom they pay their rent, and that proof of such disturbance will support a suit under this Section (*a*). And in a case under the old law it was said that injury to the *ryots* is injury to the farmer, and that he may sue his *zamindar* on account of it (*b*). When a *ryot* sued to set aside a distraint, and lost his suit from inability to prove his *pottah*, and was thus dispossessed by the decision, he was allowed to sue again for possession under Clause 6, Section 23; the Court observing that it must be considered to include cases in which the suit is brought for confirmation of possession, and to settle the question of right to possession (*c*). In one case, in which the tenant sued for possession, basing his title on *pottahs* (*d*) which were found to be forged, it was said that, notwithstanding this, he might be entitled to a right of occupancy (*e*). The plaintiff is not allowed to shift from one ground of action to another (*f*). The Collector's jurisdiction is not taken away by a mere denial of the relation of tenancy (*g*).

An intervenor cannot be heard in these suits when his allegation is that he has obtained the tenant's rights by mortgage (*h*).

As to the decree, if the right to possession have lapsed by

(*a*) *Sungat Mahton*, H. C., 23rd April, 1864.

(*b*) S. D., 1855, 36.

(*c*) *Guru Churn Kumar*, H. C., 7th June, 1864.

(*d*) Old *pottahs* cannot be always certainly presumed to be forged on its being shown that the lessor was dead at the date of their execution, as *zamindaris* were sometimes held on in the name of deceased persons. See *Gopal Lall Thakur*, Sutherland, P. C., 562.

(*e*) *Baidy Nath, Tewari*, H. C., 17th February, 1864. See *Ram Gati Bhadra*, 3rd August, 1863, and *Baidy Nath Shaha*, 16th August, 1865. This ruling seems hardly reconcilable with the cases of *Naia Hari Mahunt*, 12th August, 1862, and *Guru Dass*, 31st March, 1864, but agrees with *J. Wise*, Sutherland, P. C., 667.

(*f*) *Hara Mohun*, H. C., 18th August, 1863.

(*g*) *Hari Prasad*, H. C., 19th August, 1862, *Daya Chunder Ghose*, 16th September, 1862.

(*h*) *Adhya Prasad Chuckerbutty*, H. C., 11th August, 1863.

efflux of time or otherwise before the decree, the plaintiff cannot be reinstated, but merely a decree declaratory of his rights at the time suit was brought can be given (*a*). The rate of rent cannot properly be decided in a suit for possession (*b*). By Section 82, Act X, decree for reinstatement of a *ryot* is to be executed by giving him possession of the land; and if opposition be made, the Magistrate will give effect to the decree on the application of the Collector. By Section 83, decree for reinstatement of a middleman is to be executed by proclaiming it to the *ryots* by beat of drum, and affixing a copy of it in some conspicuous place on the *taluk* or farm.

Right to Pottahs.

The right of dependent talukdars to pottahs appears to be recognised in Section 48, Regulation VIII, 1793, which states that the *zamindars* "are to enter into engagements with the several dependent *talukdars*." The right of *ryots* to *pottahs* is clearly set forth by Section 53 of the same Regulation, which provides that "a *ryot*, when his rent has been ascertained and settled, may demand a *pottah* from the actual proprietor of land, dependent *talukdar*, or farmer, of whom he holds his lands, or from the person acting for him;" and by Section 59, "actual proprietors of land, dependent *talukdars*, and farmers were required to cause a *pottah* for the adjusted rent to be prepared and tendered to the *ryots*, either granting the same themselves, or instructing their agents to grant it" (*c*). By Section 2, Act X, "every *ryot* is entitled to receive from the person to whom the rent of the land held or cultivated by him is payable, a *pottah* containing the

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(*a*) *Ratan Moni Dasya*, II. C, 13th February, 1863, *Umanand Rai*, 11th March, 1867.

(*b*) S. D, 1851, 481.

(*c*) It was found that in many districts the *ryots* refused to accept *pottahs*, on the ground that if they bound themselves to pay a fixed sum, they would never be allowed deductions on account of bad seasons. III Harington, 421.

quantity of land, the amount of annual rent, the instalments in which the same is to be paid, and any special conditions of the lease. If the rent is payable in kind, the portion of the produce to be delivered, and the time and manner of delivery" By Section 3, *ryots* having a prescriptive right of occupancy at fixed rates are entitled to receive *pottahs* at those rates. By Section 5, *ryots* having rights of occupancy at "fair and equitable" rates are entitled to receive *pottahs* at such rates. And by Section 8, *ryots* not having a right of occupancy are entitled to *pottahs* only at such rates as may be agreed on between them and the persons to whom the rent is payable.

Suit for pottah.—By Clause 1, Section 23, Act X, the Collector has exclusive jurisdiction to hear all suits for *pottahs*, and to determine the rates at which such *pottahs* are to be given; and by Section 31, such suits may be instituted at any time during tenancy. It has been held with regard to suits for *kabuliyats* that the plaint shall contain some specification of boundaries (*a*), and probably the same rule applies to these suits. As in the case of suits for *kabuliyats*, so in the case of suits for *pottahs*, it is necessary for the plaintiff to show that the relation of tenancy already exists between himself and the defendant. The plaintiff must prove that the land for which he seeks a *pottah* forms a holding of which he is in possession as tenant to the defendant (*b*). When the plaintiff sued for a *pottah* for land which was alleged to have been added to his *jote* by alluvion, and it appeared that the plaintiff was not a *ryot* of the defendant, and had never paid him rent, the suit was dismissed (*c*). A sharer in an under-tenure cannot sue to have the tenure partitioned, and to obtain a *pottah* for his own share without the consent of the *zamindar* in writing (*d*). In one case

(*a*) *Madan Mohun Banerjya*, H. C., 25th July, 1864.
(*b*) *Nadhi Dass*, H C., 31st May, 1864.
(*c*) *Kissen Dhan Adhikari*, H C., 12th August, 1862
(*d*) S. D., 1853, 536 See Section 2", Act X.

it was said that an assignee of a portion of a *putnee taluk* might sue for a *pottah* for his share (*a*); but this seems opposed to Section 6, Regulation VIII, 1819. The fact of there being accidentally a small arrear of rent due is no bar to a suit for a *pottah* (*b*). When a tenant sued an auction-purchaser of the superior estate for confirmation of an *istimrari pottah* granted by the defaulter, it was held that the suit could not be tried by the Collector (*c*). In one case it was said that a tenant failing to prove a title to a *pottah* at fixed rates, is entitled to a *pottah* at "fair and equitable" rates (*d*). And in another case it was said he is not entitled to such *pottah* (*e*). A *ryot* without a right of occupancy is not entitled to a *pottah* unless he has agreed to the rent demanded by the landlord (*f*). By Section 76, Act X, when suit is brought by a *ryot* having a right of occupancy, if the parties cannot agree as to the term of the *pottah*, the Collector may fix any term not exceeding ten years, or the duration of the landlord's interest. "For *ryots* not having a right of occupancy, the form of the *pottah* shall be exclusively in the discretion of the person entitled to the rent of the land." By Section 80, if the landlord refuse to grant a *pottah*, the Collector may grant one in conformity with the terms of the decree, and such *pottah* shall operate as if it had been granted by the landlord.

Right to Abatement of Rent.

What tenants may claim abatement.—It was at first held that middlemen could not sue for abatement under Act X, because

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(*a*) S. D., 1859, 854.

(*b*) *Sri Ram Rai*, H. C., 22nd January, 1863.

(*c*) *Kailas Chunder Dey*, H. C., 24th June, 1864.

(*d*) *Ishwar Chunder Dass*, H. C., 10th September, 1866.

(*e*) *Durga Mahton*, H. C., 20th March, 1863.

(*f*) *Lala Shiv Lall*, H. C., 3rd March, 1863. See *Ram Manik Chuckerbutty*, 16th December, 1865.

Section 18 refers only to *ryots* (*a*). But it is now settled by a Full Bench decision that middlemen and leaseholders of all kinds may sue for abatement under Act X (*b*). But tenants having no rights of occupancy, and no *pottahs*, cannot sue for abatement, as they have no right to remain on the land if they cannot agree with the landlord as to the rent (*c*). *Ryots* holding at fixed rates of rent may sue for abatement (*d*).

As to the grounds of abatement.—By Section 18, Act X, "every *ryot* having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him, if the area of the land has been diminished by diluvion or otherwise; or if the value of the produce or productive powers of the land have been decreased by any cause beyond the power of the *ryot*; or if the quantity of land held by the *ryot* have been proved by measurement to be less than the quantity for which rent has been previously paid by him" (*e*). Mr. Campbell, in his judgment in the case of *Thakurani Dasya*, points out that this Section does not restrict *ryots* with rights of occupancy to these grounds. Abatement may be claimed by other tenants besides occupancy *ryots*, and on other grounds besides those given in Section 18 (*f*).

As to diluvion, it has been laid down that all tenants have a right to abatement of rent on this ground (*g*). In the

(*a*) *Ramdhan Banerjya*, H. C., 2nd July, 1861, *Burdwan Raja*, 18th March, 1864.

(*b*) *Hara Kissen Banerjya*, H. C., 10th December, 1864, F. B. *Shakur Ali*, 6th December, 1866.

(*c*) See *Shaikh Mohim*, H. C., 12th March, 1863.

(*d*) *Muhammad Azid Bukhsh*, N. W. P., 24th February, 1866, F. B.

(*e*) To these grounds Section 3, Act XIV, 1863, (applying only to the North-West Provinces) adds —"If the rate paid by him is above prevailing rates," which ground would seem likely to lead to confusion if the landlord sued under Section 17, Clause 2, and the tenant claimed abatement on this ground.

(*f*) *Ram Chunder Bose*, H. C., 17th August, 1863. The Agra Court has ruled contrariwise. *Ram Kissen*, N. W. P., 14th July, 1862.

(*g*) *Enaiyatulla*, 5th April, 1864.

case of *Enaiyatulla*, the Court quoted a passage from Bacon's Abridgment:—"In this place we are to consider whether the tenant shall pay the whole rent, though part of the thing demised be lost, and of no profit to him, or though the use of the whole be for some time intercepted or taken away without his default; and here it seems extremely reasonable that if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned, because the title to the rent is founded on this presumption, that the tenant enjoys the thing during the contract, and therefore if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant, without his default, wants the enjoyment of part of the thing which was the consideration of his paying the rent; nor has the lessor reason to complain, because, if the land had been in his own hands, he must have lost the benefit of so much as the sea has covered" (*a*). In this case the Court held that a tenant may claim abatement of rent on the ground of diluvion, provided there be no stipulation in his lease to the contrary (*b*). So too the rent of a *taluk* may be abated on the ground of diluvion, and a deduction may be allowed on this ground in a suit for rent (*c*). But it is doubtful if a mere tenant-at-will would be allowed a deduction of rent on this ground (*d*). It may be observed that the principle of allowing abatement of Government revenue in every case of diluvion is not recognised. The "Board of Revenue will listen to no

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(*a*) 7th edition, volume VII, page 33. The rules of English law as to tenancies of house property do not appear to follow this principle, as a tenant is liable for the rent of a house even after it has been destroyed by fire. Smith, 146, *note*.

(*b*) *Inaiyat Ulla*, H. C., 5th April, 1864.

(*c*) *Asarudin*, H. C., 19th July, 1863; *T. Savi*, 10th January, 1865.

(*d*) *Shaikh Mohim*, S. D., 17th March, 1862.

pleas for abatement of revenue unless backed by the wording of the engagements, or in very exceptional cases" (*a*).

Deficiency of area.—When a *ryot*, without a right of occupancy, obtained a *pottah* for 420 *bighas*, and got possession of 94 *bighas* only, the Court granted abatement of rent (*b*). A provision in the lease against any deduction for loss of area will not bar a re-adjustment of the rent if it be proved that the area leased is less than that stated in the lease (*c*). In another case abatement was allowed on this ground, even though there was a stipulation in the lease that abatement should not be claimed before a certain year (*d*). But if the lessee knew the land before he took the lease, and there is no ground to suspect misrepresentation, the plea of deficient area is not accepted as a valid reason for abatement (*e*).

As to abatement of a *putneedar's* rent on this ground, in a case in 1847, the Sudder Court said that up to that date there had been no distinct ruling as to the right of a *putneedar* to claim abatement of rent on the ground of deficient assets, but decreed a refund, because the surplus rents had been leased from the *putneedar* in the face of a prior decree to the contrary (*f*). In a case, in 1843, it was determined that a *putneedar* could not claim abatement of rent on this ground, except on proof of fraud on the part of the lessor, and this is no doubt correct in principle. In a case, in 1844, when a *putnee* lease was granted, and it was subsequently discovered that part of the land was rent-free, it was decided that in the absence of fraud or misrepresentation on the part of the lessor, he could not be compelled to abate the rent (*g*). In a case, in 1848, the

(*a*) R. B. to Commissioner of Rajshahye, 76, 3rd July, 1857.

(*b*) *Ram Chunder Bose*, H. C., 19th August, 1863.

(*c*) *Madhub Chatarjya*, H. C., 23rd August, 1866.

(*d*) *Hara Mani Chowdhrain*, H. C., 5th July, 1864. See S. D., 1857, 1831.

(*e*) *H. Tripp*, H. C., 25th July, 1864.

(*f*) S. D., 1847, 169.

(*g*) VII S. R., 179.

majority of the Court held that no invariable rule can be laid down to include all claims to abatement, and that they must be disposed of with reference to the particular circumstances of each case. In this case abatement of rent and refund of excess collections were decreed, as there had been a fraudulent double assignment of the *putnee* (*a*). In another case, in which the *pottah* distinctly provided that a certain number of villages should be made over to the *putneedar*, and the entire number was not made over to him, he was held to be entitled to a proportionate abatement of rent (*b*). But when it did not appear that the lease was for any determinate area, or that the rent was fixed upon the basis of any certain and specific quantity of land, no abatement of rent was allowed (*c*). In a case in 1858, in which the above rulings are collected, the same view was taken (*d*).

As to abatement of the lessor's rent, it has been held that this will give the lessee a claim to abatement if there be a condition in the lease to that effect (*e*). But without such condition it is otherwise, as contracts are not affected by what takes place between one of the parties and a stranger (*f*). Thus, when a *zamindar* leased some *chur* lands at a specified lease, and during the term of the lease the lands were re-settled with the *zamindar* at a lower *jama*, this gave the lessee no claim to abatement (*g*). If lessees wish to share in all the advantages that may be derived by their landlords from Government, there must be an

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(*a*) S. D., 1848, 506.

(*b*) S. D., 1849, 452. This agrees with the English principle of the implied warranty on the part of a lessor to give possession to his lessee of the thing demised. Smith, 207, *note*.

(*c*) S D., 1857, 1031.

(*d*) S. D, 1858, 103.

(*e*) See Jurist, 1862, 8.

(*f*) S. D., 1859, 756.

(*g*) S. D., 1853, 621.

express agreement to that effect, as the Courts cannot supply it (*a*).

Dispossession by the lessor or by parties claiming paramount to or under him, as it is a good ground for reduction of rent in a suit for rent, so also it is a valid ground for abatement. When a *putneedar* took a lease of a village with a *diara*, and the *diara* was afterwards resumed by Government, and the *putneedar* had to take a settlement of it to protect his interests, he was allowed a proportionate abatement of rent (*b*). Abatement was also allowed when Government took up the lands for a railway (*c*). Dispossession by strangers of course gives no title to abatement (*d*). But abatement was allowed when the lessee had been dispossessed in execution of a decree against the lessor (*e*).

Suits for abatement are cognizable exclusively by the Collector, under Clause 3, Section 23, Act X. A suit to establish a contested right to hold at fixed rates is cognizable in the Civil Court, and not by the Collector (*f*). When the suit was really to contest the proceedings of the Collector, and an arbitration award in the Settlement Department, it was held that it was not cognizable under this Clause (*g*).

As to limitation in these suits, the rule is that the suit must be brought within one year from the occurrence of the cause of action. In an old case it was said in a suit for abatement on the ground of diluvion that the period should be reckoned from the date of the cessation of the diluvion (*h*). In another case on the subject it was said that a *ryot* holding without a *pottah* is not barred from claiming a re-measurement and assessment at *per-*

(*a*) *Jai Kissen Mukerjya*, II. C., 5th February, 1863.
(*b*) S. D., 1857, 1081.
(*c*) *Gordon, Stuart & Co.*, II. C., 7th May, 1863.
(*d*) *Mohesh Ghose*, II C., 24th November, 1864.
(*e*) *Lakhi Dass Mustafi*, II. C., 28th August, 1867.
(*f*) *Sri Ram Ghose*, II. C., 11th March, 1864.
(*g*) *Ram Kissen*, N. W. P., 11th January, 1865.
(*h*) VII S. R., 209.

gunnah rates by having paid at a uniform rate for twelve years (*a*). When there was a condition in the lease for abatement, on the ground of diluvion, and the tenant sued for abatement and refund of excess collections for four years, which he had paid under compulsion of a summary decree, the Court held that no part of the claim was barred by limitation, as he was not actually injured till he was compelled to pay the excess rent (*b*).

In a suit based on the ground of diluvion, the *onus* of showing the extent of the diluvion rests on the plaintiff (*c*). The plaintiff cannot obtain a larger abatement than he has demanded, even though such abatement be according to the defendant's own allegations (*d*).

Complaints of excessive demand of rent also lie under Clause 3, Section 23, Act X. Section 14, Act X, provides that "any under-tenant or *ryot* on whom notice of enhancement has been served may contest his liability to pay the enhanced rent demanded of him, either by complaint of excessive demand of rent, or in answer to a suit for the arrear." A *ryot* not having a right of occupancy has no right to remain in possession unless he can agree with his landlord as to the rate of rent. Consequently, such a *ryot* cannot take the initiative by bringing an action to set aside a notice of enhancement, and to compel the landlord to let him remain in possession at a lower rent than the one demanded. But if the landlord allows him to continue in possession, he may wait till the landlord proceeds to levy the excessive rent by distress, or sues for arrears at that rate, and then he may sue the landlord for excessive demand of rent, or plead that the rent is ex-

(*a*) S. D., 1849, 188, 217. See *Lukhi Dass Mustafi*, H. C., 28th August, 1867, where it is said that limitation does not bar a claim for abatement.

(*b*) *G. Barry*, H. C., 6th May, 1864.

(*c*) *T. Sari*, H. C., 20th June, 1865.

(*d*) *Hurradhun Banerjya*, H C., 17th August, 1863.

cessive (*a*). When the plaintiff sued to resist a notice of enhancement, on the ground that he possessed a *mokarrari* title, and failed to prove this, it was unnecessary to go into the question whether the rent demanded was fair or not (*b*). But when the plaintiff sued to contest notice of enhancement issued on the ground of excess area, and it was proved that he was in possession of such excess, it was ruled that it was proper to decide the question of rates (*c*). And the rule seems to be now that when the question of rates arises on the pleadings in these suits, it should be decided (*d*).

Right to Receipts.

Clause 1, Section 63, Regulation VIII, 1793, enacts that "all proprietors of land, dependent *talukdars*, and farmers of land of whatever description, and their agents of every gradation, receiving rents or revenues from dependent *talukdars*, under-farmers *ryots*, or others, are to give receipts for all sums received by them, and a receipt in full (*farigh khatti*) on the complete discharge of every obligation." And this enactment is supplemented by Section 10, Act X, which provides that "receipts for rent shall specify the year or years on account of which the rent is acknowledged to have been paid (*e*). And any refusal to make such specification shall be held to be a withholding of a receipt. "Every under-tenant, *ryot*, or cultivator, from whom a receipt is withheld for any sum of money paid by him as rent, shall be entitled to recover from the person receiving such rent

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(*a*) *Shaikh Mohim*.

(*b*) *Gunga Pershad Singh*, H. C., 11th November, 1862.

(*c*) *Gorachand*, H. C., 17th May, 1867.

(*d*) *Ghulami*, H. C., 28th March, 1865.

(*e*) It is a very common practice to antedate receipts granted before the *puneya*, or first rent-day in the year, which is usually held in *Jeyth* or *Assar*. Thus a receipt dated 15*th Jeyth*, 1272, implies that the money was paid in *Jeyth*, 1273, on account of the rent of 1272. Sometimes the words *sal akhiri* are added.

damages not exceeding double the amount paid." The receipt must be a separate one, as the mere recital of the payment in a plaint is not enough (*a*). Under the Stamp Act, receipts granted to middlemen for sums exceeding 20 Rupees require a stamp of one *anna*, and such receipts are not admissible in evidence when unstamped (*b*). The person receiving payment is liable, under Section 29, Act X, 1862, to a penalty for refusing to provide a stamp (*c*). But receipts for the rent of *land paying revenue to Government* granted to any *ryot* or actual cultivator for the rent of land cultivated by him, are exempt. "Rent-free" grants which have originated since 1790 must not be confounded with "revenue-free" lands; but as all land held *lakhiraj* in 1790 was excluded from the assessment, all rent-free grants which date from before 1790 are also revenue-free, and the exemption does not therefore apply to the *ryots* of such lands. Unstamped receipts were admitted when granted to a Rungpore *jotedar*, as there was no direct proof that he under-let his lands, though they were of considerable extent (*d*).

Suits for damages on account of refusal of receipts lie under Clause 2, Section 23, Act X. It was held that, under Section 63, Regulation VIII, 1793, demand and refusal must be proved (*e*). When the cause of the refusal was a dispute as to the nature of the tenure, it was always held that damages could not be given (*f*). But if the landlord disputed the tenant's title without cause, it would seem that damages ought not to be refused. To one case the Court said no dishonest intention was proved against the landlord; and that as this was a penal provi-

(*a*) *Dhanpat Singh*, H C., 25th February, 1867.

(*b*) S. D, 1852, 993, 995.

(*c*) *Gour Prasad Singh*, H. C., 2nd May, 1867.

(*d*) S. D., 1857, 117.

(*e*) S. D., 1859, 441, 1853, 815. It should be observed that the word used in Regulation VIII, 1793, was "refusal," and not "withholding," of receipts. Clause 2, Section 23, Act X, also has the word "refusal."

(*f*) I S. R., 304, II S. R, 221.

sion, it must be construed strictly, and they therefore refused damages (*a*). This seems a very questionable ruling, as the law declares the right to damages on conditions quite irrespective of the honest or dishonest intention of the landlord. When part of the rent is paid by the tenant on the landlord's account, and under his direction, to the Collector of Revenue in satisfaction of revenue due from him to Government, the damages of this Section cannot be awarded if the landlord withhold a receipt for that part (*b*).

As to the measure of the damages, it has been held that it is improper to award in all cases double the sum paid as damages. The Section does not give double the sum paid as a "penalty," but "damages;" that is, a compensation for any damage or loss sustained by the tenant to an extent not exceeding double the amount paid. In this case it was said, in assessing the damages, it would be proper to consider the denial of the tenant's title as *ijaradar*, and the denial of the receipt of the rent (*c*). The tenant is entitled to some damages, but the Court has a discretion as to the amount (*d*).

It was ruled in the case of *Rasmani* (just quoted) that the principal is liable for the act of his agent who refuses receipts. There are some cases to the contrary among the Sudder.

(*a*) VI S. R., 26. "As to the rule requiring penal provisions to be construed strictly, it has been said that in modern times it has been so modified and explained away as to mean little more than that penal provisions, like all others, must be fairly construed according to the legislative intent of the enactment, the Courts, on the one hand, refusing to extend the penalty to cases which are not clearly embraced in the provisions, and on the other, equally refusing by any mere verbal nicety to make forced constructions or equitable interpretations to exonerate parties plainly within the scope of such provisions." Sedgwick, Statutory Law, 326.

(*b*) *Gamina Chowdhraini*, H. C., 13th September, 1866.

(*c*) *Rasmani Debya*, H. C., 22nd April, 1863.

(*d*) *Zamur-un-nissa*, H. C., 8th December, 1864.

Reports (*a*). But this ruling is, no doubt, correct (*b*). And as Section 63, Regulation VIII, 1793, imposes the obligation of giving receipts on agents as well as on their principal, it would seem that an agent refusing receipts might also be held personally liable for a breach of that statutory obligation.

Exaction of Excess Rent.

By Clause 2, Section 51, Regulation VIII, 1793, it was provided that if a *zamindar* exacted more from a *talukdar* than he had a right to, he should pay a penalty of double the amount to the *talukdar* with all costs of suit; but this has been rescinded by Section 1, Act X. Section 52 (*c*) of the same Regulation provides that "all sums received by any actual proprietor of land, or any farmer of land, of whatever description, over and above what is specified in the engagements of the persons paying the same, shall be considered as exacted," so that it would seem not to be necessary to prove compulsion. By Section 55, (also repealed,) "every exaction of any new *abwab* or *mathaut* was to be punished by a penalty equal to three times the amount imposed; and if at any future time it be discovered that new *abwabs* or *mathauts* have been imposed, the person imposing the same shall be liable to the penalty for the entire period of such imposition." By Section 63, (which is still in force,) landlords are forbidden to realize the rents of absconded *ryots* from those that remain. Section 10, Act X, provides that "every under-tenant or *ryot* from whom any sum is exacted in excess of the rent specified in his *pottah*, or payable under the provisions of Act X, 1859, whether as *abwab* or under any other

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(*a*) S. D., 1855, 400; 1858, 888

(*b*) "The party employing has the selection of the party employed; and it is reasonable that he who has made choice of a careless or unskilful person to execute his orders should be responsible for the want of skill or care of the person employed." Broom's Commentaries, 667-669; Addision on Torts, 775. S. D., 1858, 995. New Contract Law, Section 217.

(*c*) This Section has not been repealed.

pretext, shall be entitled to recover from the person receiving such rent damages not exceeding double the amount so exacted."

Suits for damages on account of illegal exaction of excess rent, or of any unauthorized cess or impost, are cognizable solely by the Collector under Clause 2, Section 23, Act X. Notwithstanding the provisions of Section 52, Regulation VIII, 1793, proof of compulsion has been sometimes required. When a tenant had continued to pay rent for several years at a rate higher than that specified in his lease, and then turned round and sued his landlord for exaction, it was held that the receipt of such voluntary payments could not be considered exaction (*a*). In another similar case the Court ruled that the *jama bandi* pleaded by the tenant, as fixing the terms of the tenancy, had clearly been set aside by a subsequent arrangement (*b*). But, on the other hand, it has been decided that long payment of an illegal cess without demur does not legalise it or turn it into rent (*c*). The plea that the higher rent is according to a rent roll furnished by the *zamindar*, is no excuse for exacting rent in excess of that payable on a *mukarrari* tenure (*d*).

It has always been held that suit for exaction will not lie when the excess has been exacted by legal process, but that this must be remedied by suit in the Civil Court (*e*). There are many instances of such suits for refund of excess rent paid under legal compulsion. Thus a tenant who had paid excess rent under threat of an arrest under Regulation VII, 1799 (*f*), a *putneedar* forced to pay rent twice over by com-

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(*a*) S D, August, 1860, 172.

(*b*) S D., 1857, 1223. See *Purnima Chowdhrain*, H. C, 21st July, 1864, quoted in Chapter III under "Amount of Rent Payable."

(*c*) *Rajoni Poramanik*, H. C., 16th May, 1866. See cases quoted in Chapter II under "Cesses."

(*d*) S. D., 1855, 401.

(*e*) *Debendernath Rai*, 23rd April, 1863.

(*f*) S D, 1848, 227.

pulsion of the summary sale process (*a*), and a *ryot* forced to pay excess rent by compulsion of the distraint process (*b*), have all been decreed refunds of rent. In one case it was said that a tenant who has paid rent twice over can recover it only on proving that it was paid in consequence of fraud or coercion on the part of the landlord, or under such a mistake of fact with regard to its being due as to render it inequitable that he should retain it (*c*). In another case it was said that if the excess rent has been paid merely through error, the tenant's proper course is not to sue for a refund, but to claim credit for the over-payment at the next *kist* (*d*).

As to the liability of principals for exaction by their agents, Clause 7, Section 15, Regulation VII, 1799, (now repealed,) expressly declared them to be liable. Macnaghten says that in such cases the agent must be presumed to act for his principal, as it is the duty of the principal to restrain his agent from abusing the power vested in him (*e*). But in several old cases it was held that principals could not be held answerable for *illegal* acts committed by their agents, unless express authority to commit such acts be proved, or it be shown that they were subsequently ratified by the principals (*f*). And this appears to agree with the rule laid down in the new Contract Act, and with the ruling of the High Court in the case of *Kali Mohan Rai* (*g*). When a tenant sued a minor and his guardian jointly for rents unduly levied during the minority of the former,

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(*a*) S. D., 1858, 1080.

(*b*) S. D., 1857, 748. But it would seem that excess rent levied by distraint might now be recovered in the shape of damages under Section 141, Act X.

(*c*) *Ram Chunder Muzumdar*, H. C., 2nd September, 1865.

(*d*) *Gobind Nath Sandial*, H. C., 31st December, 1862.

(*e*) III Harington, 467, note.

(*f*) S. D., 1850, 287, 1853, 339. But see S. D., 1858, 955.

(*g*) H. C., 13th February, 1863.

it was held that the guardian only was liable in the first instance, though the minor had attained his majority while the suit was pending, and that the guardian might afterwards sue for reimbursement (*a*).

When a *zamindar* collected the rent due from the *ryots* for the purpose of satisfying the rent due from the *thikadars*, and retained a larger sum than was due from the *thikadars*, it was held that he might be said to have exacted the difference from the *thikadars*, and that they might sue him under Clause 2, Section 23 (*b*). On the other hand, when a cultivator sued the *zamindar* for exaction from the *shikmi ryots*, the Agra Court ruled that, as Section 10 limits the power to sue to those from whom the money had been exacted, such a suit was not cognizable under Clause 2, Section 23 (*c*). In suits for exaction, claims of third parties to be the real holders of the tenure cannot be received (*d*).

EXTORTION OF RENT BY DURESS (*e*).

Clause 8, Section 15, Regulation VII, 1799, allowed landholders

(*a*) III S. R., 38.

(*b*) *Ram Prasad Bhakat*, H. C., 31st July, 1863, (decided by Sir R. Peacock, C. J., and Shumbonath Pundit, J.)

(*c*) *A. Martin*, N. W. P., 27th May, 1862.

(*d*) S. D., 1849, 349.

(*e*) The Muhammadan Tax Collectors devised a number of modes of torture for recusants. In Grant's Analysis (Fifth Report, 261), it is said that *Jafir Khan* "devised the memorable loathsome tortures of the *Vykuntha* or *Vishnu's*, paradise, a place filled with all kinds of nastiness, in which the patient probationary sufferers" were kept till they paid. Under the method called *Awangilli*, the tax-payer was made to stand with each foot upon an inverted earthen pot, the shape and size of which endangered his falling, while a whipper stood by to flog him if he lost his footing. (Wilson, 46.) Sir H. Strachey, writing from Midnapore in 1802, states that formerly a whipper was considered a necessary part of every *tehsildar's* establishment, (III Harington, 515,) and that extortion was the most prevalent crime throughout the country, even at the time he wrote (Fifth Report, 690). The amount of coercion which *zamindars* might legally exercise to compel payment of the revenue was never defined before 1793 (III Harington, 515).

to enforce the attendance of tenants at their *Cutcherries*, and Construction 382 ruled that this involved the power of punishing recusants. But Section 11, Act X, provides that "the power heretofore vested in *zamindars* and other landholders of compelling the attendance of their tenants for the adjustment of their rents, or for any other purpose, is withdrawn, and all such persons are prohibited from adopting any means of compulsion for enforcing payment of the rents due to them, other than are authorized by the provisions of this Act." And by Section 12, "if payment of rent, whether the same be legally due or not, is extorted from any under-tenant or *ryot* by illegal confinement or other duress, such under-tenant or *ryot* shall be entitled to recover such damages, not exceeding in any case the sum of two hundred rupees, as may be deemed a reasonable compensation for the injury done him by such extortion. An award of compensation under this Section shall not bar or affect any penalty or punishment to which the person practising such extortion may be subject by law."

Suits for damages on account of extortion of rent are cognizable only by the Collector under Clause 2, Section 23, Act X. A suit for damages on account of the extortion of a *kabuliyat* lies, not under this Clause, but in the Civil Court (*a*).

Right to Alluvial Increments.

By Clause 1, Section 4, Regulation XI, 1825, it is provided that "when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a *zamindar*, or as a subordinate tenure by any description of under-tenant whatever. Provided that the increment of land thus obtained shall not entitle the person in possession of the tenure to which the land may be annexed to a

(*a*) S. D., 22nd May, 1860.

right of property or permanent interest therein, beyond that possessed by him in the tenure to which the land may be annexed. * * * * * Nor, if annexed to a subordinate tenure held under a superior landholder, shall the under-tenant, whether a *khudkasht ryot* holding a *maurusi istimrari* tenure at a fixed rate of rent *per bigha*, or any other description of under-tenant liable by his engagements, or by established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable." By Clause 2, this rule does not extend to cases in which land is cut off from one estate or tenure, and joined to another by a sudden change in the course of a river (*a*). The High Court has ruled that this right to alluvial increments belongs only to middlemen holders of tenure, and to *khudkasht* and other *ryots* who may, by their tenure or by contract, possess some permanent interest in the land, and that it does not belong to mere tenants from year to year (*b*). When a *maurusi* tenure included the *julkar* in a certain *bhil* which silted up, it was held that the tenant could not claim the land, as the right of fishery is a mere incorporeal right not implying any right of property in the soil; and Regulation XI, 1825, applies only to accessions gained by the action of a river or the sea (*c*). When a tenure is joint, however it may be sub-divided among the co-sharers, any alluvial increment to the land is subject to the common rights of all, and one sharer can compel the *zamindar* to admit him to settlement conjointly with the rest (*d*). Act XI of 1847 does not bar Government as *zamindar* of a *khas mehal* from taking possession of and assessing all accre-

(*a*) Land gained by "gradual accession" is called "*dhowa*," and that by sudden change of a river's course "*chaki*."

(*b*) *Zahir-ud-Din Pykar*, H. C., 17th November, 1865.

(*c*) *Sarup Chunder Muzumdar*, H. C., 9th March, 1863. See II Macnaghten's Reports, 51; S. D., 13th March, 1818, *Imambandi*, Sutherland, P. C., 208.

(*d*) S. D., 1859, 1617.

tions to such estates under Regulation XI, 1825 (*a*). When the land had accreted to a *lakhiraj* tenure, the Judges were divided in opinion as to whether the right of assessment belonged to Government or to the *zamindars* (*b*).

Suit for pottah is the ordinary method by which a tenant asserts his right to accretion, but such suit will only lie against the claimant's own landlord (*c*).

(*a*) *Abhaya Churn Chowdhry*, H. C., 21st November, 1865.

(*b*) S D., 1858, 1836.

(*c*) *Kisen Dhan Adhikari*, H. C., 12th August, 1863.

CHAPTER V.

DETERMINATION OF TENANCY.

Tenancy is determined, or put an end to, in the following ways:—

1. By surrender.
2. By efflux of time.
3. By cancelment on account of the sale of the parent estate or tenure for arrears of revenue or rent.
4. By forfeiture on account of non-payment of rent or breach of conditions.

Surrender (*a*).

Section 19, Act X, provides that "any *ryot* who desires to relinquish the land held or cultivated by him shall be at liberty to do so, provided he gives notice of his intention in writing to the person entitled to the rent of the land, or his authorized agent, in or before the month of *Cheit* of the year preceding that in which the relinquishment is to have effect. If he fail to give such notice, and the land is not let to any other person, he shall continue liable for the rent of the land. If the person entitled to the rent of the land, or his agent, refuse to receive

(*a*) Surrender is defined to be "the yielding up of an estate for life or years to him that hath an immediate estate in the reversion or remainder." Lord Coke, quoted in Smith, 223. English lawyers distinguish two species of surrender—that "in express terms" and that "by operation of law," *i. e.*, when the surrender of the original lease is implied from the acceptance of a new lease, or from assignment by the tenant to another person. This distinction was originated by the Statute of Frauds, Smith, 224

any such notice, and to sign a receipt for the same, the *ryot* may make an application on plain paper to the Collector, who shall thereupon cause the notice to be served on such person or his agent in the manner provided in Section 13." It would seem from this Section that all *ryots*, even those holding under unexpired leases, are entitled to surrender their tenancies at the close of any year, and this view was taken in the case of *Thakurani Dasya* (*a*). In one old case it was held that a tenant holding under a perpetual lease, even when in arrear with his rent, might surrender his lease, provided he did so in proper form, and at the close of the year (*b*). But in a recent case it was said that a tenant who has entered into a written engagement for a certain time cannot surrender (*c*). A *ryot* cannot relinquish a part of his tenure without the assent of the landlord (*d*), and under the ancient usage, *khudkast ryots* were not allowed to throw up a portion of their holdings (*e*). A formal written notice of surrender (*istifa*) is not necessary in all cases (*f*). In one case an *utbandi ryot*, on being served with notice of enhancement, told the landlord's agent of his intention to surrender, and this was held a sufficient compliance with Section 13 (*g*). Probably, also, the cancelment of

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(*a*) H. C., 19th June, 1865, F. B. Sir B. Peacock, in his Minute of 31st March, 1864, says:—"It is useless for landlords to grant a lease for a term of years if the tenant may throw it up whenever he will. The advantage is all on one side." But if the Courts may decree *kabuliyats* for a fixed term as laid down in *Thakurani Dasya*, it would seem only equitable that the tenant should be allowed to surrender if he finds he cannot pay the rent.

(*b*) VII S. R., 174.

(*c*) *Kashi Singh*, H. C., 9th May, 1866. But a contract never to surrender is not binding on the heirs of the contracting *ryot*, *Sri Gopal Pal Choudhary*, H. C., 6th January, 1868.

(*d*) *Saroda Sundari Debya*, H. C., 4th May, 1866.

(*e*) Sir J. Shore's Minutes, Fifth Report, 164.

(*f*) S. D., 1858, 1880.

(*g*) *T. Kenny*, H. C., 2nd February, 1864.

a lease by the landlord, or the grant of a new tenancy on different terms, would be construed as a surrender of the former tenancy (*a*). It is not imperative on the *ryot* to serve his notice through the Collector. When a *ryot* tendered a notice to the landlord in the month of *Cheit*, and on his refusal to receive it, made application to the Collector after the end of *Cheit*, and the Collector failed to issue the notice, it was held that the terms of the Section had been sufficiently complied with (*b*).

As to the effect of notice, it has been held that a mere notice does not relieve the tenant, from liability for the rent; it is the actual relinquishment of the property that relieves him. In this case a tenant who had been for many years in possession of certain *julkur*, served a notice of surrender upon his landlord; and as the property was one the knowledge of which rested much with the tenant, the Court said it rested with him to show that he had actually relinquished it (*c*).

A lessee can only get free from a lease taken under fraudulent misrepresentation by proceeding in the Civil Court, as Section 13 does not apply to such a case (*d*). A *ryot* who absconds without giving notice, retains no title to the land (*e*). It is a rule of English law that a surrender by a lessee does not affect the rights of third parties holding leases from the party surrendering (*f*); and this rule has been followed in Section 12, Regulation VIII, 1819, which enacts that a surrender by a *putneedar* shall not prejudice the rights of the *dur-putneedars* claim-

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(*a*) See Goodeve, 549.

(*b*) *A. Rodger*, 22nd July, 1867.

(*c*) *Nobin Chunder Rai*, H. C., 15th August, 1864 See a dictum in *Syud Muhammad Azmul*, H. C., 11th March, 1867.

(*d*) *Bholanath Khan*, H. C, 23rd January, 1867.

(*e*) *Manir-ud-Din*, H. C., 3rd July, 1866. Lands thus abandoned are called *gayal* and *palataka*.

(*f*) Smith, 231.

ing title from him (*a*). A Hindu widow cannot bind her sons by an *istifa* (*b*).

As to surrender by middlemen, it has been held that they have the right of surrendering their tenancies when they are not bound to the land for any particular term (*c*). And if the *zamindar* refuses to allow surrender, suit will lie in the Civil Court to enforce it (*d*). But Section 19, Act X, does not apply to middlemen, and the Collector has no jurisdiction in such cases (*e*).

As to stamps, deeds of surrender executed by middlemen now require a stamp under Article 34, Schedule A, Act X, 1862, though formerly it was not so (*f*). But those executed by a *ryot* or other actual cultivator are exempt (*g*). Deeds of surrender of leases for terms exceeding one year also require registration.

Efflux of Time (*h*).

This mode of termination of tenancy is one which of course applies only to contract tenants holding for a term of years, from year to year, or at will. It cannot apply to statutory tenants, as they possess the right of holding in perpetuity. When a statutory *talukdar* has executed an engagement to pay a definite rent for a definite period, this does not make him liable to ejectment at the end of the period (*i*). And the same rule

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(*a*) See II, S. R., 325. But Clause 2, Section 3, Regulation VIII, 1819, declares that under-leases by a *putneedar* will not hold good against the *zamindar*.

(*b*) *Wahid Ali*, II. C., 9th December, 1862.

(*c*) S. D., 1858, 1880.

(*d*) S. D., 1857, 1270.

(*e*) *Bholanath Khan*, II. C., 23rd January, 1867.

(*f*) S. D., 1855, 205.

(*g*) S. D., 1853, 401.

(*h*) Another mode in which a tenancy is sometimes determined, which is somewhat similar to efflux of time, is extinction of the subject-matter of the tenancy, *e. g.*, the drying up of a *jhil*. *Jardine Skinner*, II. C., 9th March, 1863.

(*i*) *Hari Gobind Dass*, II C., 23rd July, 1866.

would hold good of a *ryot* with a right of occupancy who has executed a *kabuliyat* for a term of years (*a*). But tenants, whose titles are derived solely from contract, are of course liable to ejectment at the expiration of the term for which they have contracted. The moment the tenant's term expires, the landlord's reversion becomes a right to the possession (*b*). In the case of a lease for life, it was held that repeated transfers of the rights of the lessee, and length of possession, formed no bar to recovery of possession by the lessor or his representatives on the decease of the lessee (*c*). No length of occupancy will protect a farmer from liability to ejectment at the end of his term (*d*). A tenant on an indefinite lease, or without a lease, cannot be ejected before the close of the year, as the tenancy in this case is presumed to run from year to year (*e*).

Holding over. When the lease of a contract tenant expires, the tenant's title to possession expires with it; and if he continue in possession after its expiration, he continues without any title at all. Still, as he originally entered by good title, he becomes not a mere trespasser, but a tenant by sufferance (*f*). If a tenant on an indefinite lease pays rent for a portion of a year, a new tenancy for that year is created, and he cannot be ejected till the close of it. A landlord who does not eject a tenant at the close of the year, and who exacts no new lease from him, acquiesces in the tenant's holding on under the old engagement for another year (*g*). The Agra Court have ruled that the tenancies of *ryots* holding indefinite leases extend from year to year,

(*a*) See Section 25, Act X.

(*b*) Smith, 216.

(*c*) VII S. R., 94

(*d*) S. D, 1849, 9 See cases quoted under "Farms" and contract tenancies in Chapter I.

(*e*) *Madar Khan*, H C., 27th March, 1863.

(*f*) Smith, 217.

(*g*) *Janaki Nath Sen*, H. C., 6th July, 1865, *Ram Kilawan Singh*, 13th February, 1867.

and expire at the end of the year in which notice to quit or notice of relinquishment is given, and in the absence of such notice a tacit renewal from year to year is presumed (*a*). As to the terms of the new tenancy of tenants holding over, the English rule is that, though the tenant holding over at end of his lease holds over as a (so-called) "tenant by sufferance," still if, when the period for payment of rent comes, he pays to his landlord the former rent, he becomes a "tenant from year to year," the payment of such rent by him, and the acceptance of it by the landlord, being considered indicative of their mutual intention to create a new yearly tenancy, and the yearly tenancy thus raised is governed by the provisions of the expired lease, so far as they are consistent with a yearly tenancy (*b*). In a recent case it was said that when a tenant holds over after the expiration of a lease, he does so on the terms of the lease, at the rent, and on the same stipulations as are mentioned in the lease, until the parties come to a fresh settlement (*c*). And in another case it was held that a tenant holding over was bound by a condition in the expired *kabuliyat* providing for ejectment on the occurrence of an arrear (*d*). If the landlord has served notice to quit, or pay an enhanced rent, the tenant remaining on the land is liable to pay the amount demanded (*e*). A landlord is empowered to eject a tenant-at-will at the end of the agricultural year, of his own motion, whenever he pleases, and the circumstance of the cause of ejectment being the non-compliance of the tenant with an illegal demand of enhanced rent, does not

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(*a*) *Tikam Singh*, N. W. P., 11th May, 1863. It is a moot point whether notice to quit is necessary to determine such a tenancy in Bengal. See *Digambar Dutt*, 1 Fulton, 452, and Sir B. Peacock's Minute, 31st March, 1865.

(*b*) Smith, 220,—1.

(*c*) *Inayatulla*, H. C., 5th April, 1865.

(*d*) *Hara Prosana Kai*, S. D., 31st December, 1861.

(*e*) *Kabir Sirdar*, H. C, 29th June, 1865.

alter the case (*a*). But of course this does not apply to statutory tenants. If the tenants have a right of occupancy, the enhanced rent demanded must be pronounced fair and equitable by the Courts before they can be ejected (*b*).

Adverse possession.—If a tenant at the end of his term holds over against the will of his landlord, ceases to pay rent, and sets up a proprietary title in himself, his possession from that date becomes adverse to his landlord, and any suit on the part of his landlord to recover the land would, it seems, be barred if brought after the expiration of the usual period of limitation reckoned from that date (*c*). But, apparently, mere withholding of the rent does not, by itself, necessarily imply the setting up of an adverse title (*d*). If the tenant has paid rent during the period of his holding over, he cannot plead limitation to bar his landlord's suit for possession of the lands, as his possession in such a case is non-adverse to his landlord (*e*). In one case it was said that in India the doctrine "once a tenant, always a tenant" holds good, and that land which is admitted to have been within the estate of a proprietor cannot, by any fraud or omission of legal obligation on the part of the tenant, be converted into the absolute property of the tenant. In other words, the possession of the tenant can never become adverse to the landlord, and therefore the law of limitation can never be applied to bar the landlord's suit for possession (*f*). In the case of *R. Watson*, decided by a Full Bench, the Chief

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(*a*) *Man Singh*, N. W. P., 14th May, 1864.

(*b*) S. D., 1850, 8.

(*c*) *Lall Bibi Chowdhrain*, H. C., 30th April, 1863; 1850, 491; 1859, 411, 1855, 253. It is said that the doctrine of non-adverse possession has been done away with in English law by the Statute 3 and 4, Will. IV, cap. 27. Smith, 218.

(*d*) S. D., 1851, 340.

(*e*) *Bansi Dhur Dass*, H. C., 19th December, 1864.

(*f*) *R. Watson*, H. C., 5th January, 1863; *Suhul Chander Sett*, 2nd August, 1862, S. D., 1849, 188. See 1856, 617.

Justice said that, under the Civil law, a farmer or tenant could not acquire by prescription the "dominion" of the land which he hold by a farming title; for, according to Domat, in order to prescribe, it is necessary to possess, and to possess as master; and accordingly in that case it was held that a tenant could not prescribe against his landlord suing for possession when the tenant had never set up a proprietary title before the suit (*a*). In another case it was said that a tenant derives title from his landlord, and cannot therefore resist a suit by that landlord questioning that title by pleading limitation (*b*). A farmer who remains in possession after his lease has expired, does so at his own risk, and is liable to refund the gross profits received by him during the period of his holding over (*c*). When a tenant-at-will held over on sufferance for twenty-six years, it was held that this gave him no right of occupancy (*d*).

Remedy by eviction.—When a tenancy expires by efflux of time, the landlord may, of his own authority, enter on the land without obtaining a decree authorizing him to do so if he can succeed in making such entry peacefully. But he is not allowed to eject a tenant by force, and is bound to apply to the Collector for aid, under Section 25, if he finds any legal impediment to his resuming possession (*e*). Tenants who have been in possession for a great length of time cannot be ejected summarily (*f*).

Application for aid to eject tenants.—Section 25, Act X, provides

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(*a*) *R. Watson*, H. C., 13th June, 1865, F. B. See S. D., 1858, 1713; 1862, 284, 292, 1850, 491, 1860, 643, *Government*, H. C., 16th March, 1863.

(*b*) *Shuttidar Mujumdar*, H. C, 24th September, 1864.

(*c*) S.D., 1854, 20. As to the measure of the damages in cases of holding over against the will of the landlord, see VII S R., 163

(*d*) S D., 1855, 589.

(*e*) *Rughu Nundan Singh*, H C., 27th September, 1864; *Sheo Ratan*, 11th May, 1864. See Broom's Commentaries, 224. *Suful Khan*, H. C., 15th January, 1868. If the tenant is dispossessed by force, he may sue to recover possession under Section 15, Act XIV, 1859.

(*f*) VII S. R, 37.

that "if any *zamindar* or other person in the receipt of the rent of land requires assistance to eject any cultivator not having a right of occupancy; or to eject any farmer, or other tenant holding only for a limited period, after the determination of his lease or tenancy; or to enforce any attachment or ejectment expressly authorized by any Regulation or Act, he shall make application to the Collector, and the Collector shall proceed thereupon to enquire into the case, and pass orders in the manner provided for suits under this Act." Provided that suits for the ejectment of *thika zar-i-peshgi-dars* and other mortgagee tenants shall be heard only in the Civil Court. An application under this Section is not a suit, and the order of the Collector is not one from which an appeal lies to the Judge. It is a mere summary application to the Collector to give aid in circumstances under which, by the old law, the landlord might have ejected the tenant without resort to the Court. This Section does not preclude a landlord from bringing a regular suit for ejectment in the Civil Court if he prefers to adopt that course (*a*). And orders passed by the Collector under this Section may be contested by suit in the Civil Court, or under Clause 6, Section 23, in the Collectorate (*b*). A person ejected under this Section can sue in the Civil Court to establish his right, whether he be a party to the original proceeding or not (*c*).

Relation of landlord and tenant.—It has been settled by numerous rulings that, in order to maintain a suit under this Section, it is necessary that the relation of landlord and tenant should exist between the parties. When the landlord had from the first refused to recognise a transferee of a *jote* as his tenant, and had never received rent from him, it was held that

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(*a*) *Mudan Mohan Rai*, H. C., 21st August, 1863; *Waris Ali*, N. W. P., 16th February, 1864, F. B., *Abdul Ali*, N. W. P., 26th February, 1864; *Rajendar Kumar*, 29th November, 1864.

(*b*) *C. P. Philippe*, H. C., 3rd June, 1863, *Shenamber*, N. W. P., 8th April, 1864.

(*c*) *Jots Ram Kaora*, H. C., 1st August, 1865.

the suit would not lie under Section 25, but was rightly brought in the Civil Court (*a*). When a tenant who had executed a *kabuliyat*, and paid rent for a series of years, afterwards refused to pay any longer, it was ruled that the plaintiff might have sued him for rent when he first ceased to pay, and first set up an adverse title, but as he now regarded him as a trespasser, the suit for ejectment was rightly brought in the Civil Court (*b*). In another case in which the plaintiff sued to eject the defendant as a trespasser, expressly denying the existence of the relation of landlord and tenant, and the defendant pleaded purchase of a saleable tenure, it was said that the *forum* to settle the matter was undoubtedly the Civil Court, as, if the defendant were a trespasser, the Rent law had nothing to do with the case (*c*). When the defendant pleaded a title as tenant to a hostile *zamindar*, who was made a co-defendant, and the plaintiff's title was established, it was held that the suit was properly brought in the Civil Court (*d*). When the plaintiff alleged the defendants to be in possession without any title at all, and the defendants set up a proprietary title adverse to the plaintiff, it was held that the suit was cognizable by the Civil Court only (*e*). An application for the ejectment of a tenant, on the ground that his *pottah* is invalid, as having been granted by a *naib* without authority, will not lie under this Section, as that is much more a judicial than an executive question (*f*).

(*a*) *Taramani Dasya*, H. C., 8th September, 1864.

(*b*) *Shib Prasad Chuckerbutty*, H. C., 9th June, 1864.

(*c*) *Beni Madhub Banerjya*, H. C., 6th September, 1865.

(*d*) *Fukir Rahman*, H. C., 29th November, 1864.

(*e*) *Mona Bibi*, N. W. P., 14th October, 1863. But in the case of *Surendra Nath Rai*, H. C., 11th August, 1864, a suit against a trespasser appears to have been admitted, and the words "any cultivator not having a right of occupancy" seem wide enough to include squatters at least.

(*f*) *Jai Kissen Mukerjya*, H. C., 14th January, 1865. It seems the proper procedure in these cases is to sue to cancel the lease. See H. C., 12th August, 1862. If the tenant has been long in possession under such a lease he cannot be ejected summarily. (VII S. R., 37.)

As to the procedure in these cases, it has been ruled that a *zamindar* cannot apply to oust a *ryot* while the village is in the hands of a farmer (*a*). If, in a case under this Section, the tenant sets up a permanent lease, the *onus* of proving it rests on his shoulders (*b*). In a suit to eject a tenant holding over, the tenant cannot question his landlord's title (*c*). Tenants holding under titles judicially recognized, cannot be ejected summarily under this Section (*d*). The appeal from orders passed under this Section lies to the Collector and the Commissioner (*e*).

Cancelment by Sale of Parent Estate or Tenure for Arrears.

By sale of estate.—Section 37, Act XI, 1859, provides that "the purchaser of an entire estate in the permanently settled districts of Bengal, Behar, and Orissa, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free of all encumbrances which may have been imposed on it after the time of settlement, and shall be entitled to avoid and annul under-tenures, and forthwith to eject all under-tenants, with the following exceptions (*f*).

(*a*) *Perthi Narain Singh*, N. W. P., 8th May, 1862.

(*b*) *Lutchmi Narain*, S. D., 12th June, 1862.

(*c*) *Mohesh Chunder Biswas*, H. C., 25th March, 1863.

(*d*) *Ram Sewak Singh*, N. W. P., 7th November, 1861.

(*e*) *Ram Kumar Mukerjya*, S. D., 22nd August, 1861, *Mir Muhammad Taki*, 17th June, 1861; *C. Philippe*, H. C., 3rd June, 1863; *Fukir Koer*, N. W. P., 25th November, 1862, F. B.

(*f*) The Board of Revenue, in a report on the sale law made in 1838, pointed out that, Regulation XLIV, 1793, nothing like ousting the *talukdars* and *ryots* was contemplated. In the recent case of *Rani Surnamayi*, the Privy Council ruled that the object of that Regulation was not the destruction of the under-tenures upon the sale of the parent estate for arrears of revenue. It simply empowered the purchaser to avoid the subsisting engagements as to rent, and to enhance the rent to that amount at which it would have stood according to the established usages and rates of the *pergunnah*, had the cancelled

"*First.*—*Istimrari* or *mukarrari* tenures which have been held at a fixed rent from the time of the permanent settlement.

"*Secondly.*—Tenures existing at the time of the settlement which have not been held at a fixed rent.

"*Thirdly.*—*Talukdari* and other similar tenures created since the time of settlement, and held immediately of the proprietors of estates and farms for terms of years so held, when such tenures and farms have been duly registered under the provisions of this Act.

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engagements never existed. Thus the power of ejectment could only be exercised if the tenant refused to pay a fair rent. But Section 30, Regulation XI, 1822, (following Section 11, Regulation VIII, 1819, which, however, protected *ryots*,) gave auction purchasers the full power of annulling "tenures" and ejecting under-tenants, and this power has been continued to them by the subsequent sale laws,—Acts XII, 1841, I, 1845, and XI, 1859. (*See* Mr. Trevor's Minute, dated 5th November, 1864, and Mr. Morgan's judgment in *Thakurani Dasya.*) Sir E. Colebrooke remarks that "the errors of the permanent settlement were twofold. *first*, in the sacrifice of the yeomanry, by merging all village rights, whether of property or occupancy, in the all-devouring recognition of the *zamindar's* paramount property in the soil (see Fifth Report, 628); and *secondly*, in the sacrifice of the peasantry by one sweeping enactment which left the *zamindar* to eject or settle with them on such terms as he might require." (Briggs, 192.) Lord Cornwallis never contemplated such unlimited licence of ejectment as was conferred on auction purchasers by Regulation XI, 1822. He says, in a Minute of 3rd February, 1790 :—"Neither is the privilege which the *ryots* in many parts of Bengal enjoy of holding possession so long as they pay the revenue incompatible with the proprietary rights of the *zamindars*. Whoever cultivates the land, the *zamindar* can receive no more than *the established rent*, which, in most cases, is fully equal to what the cultivators can afford to pay. To permit him to dispossess one *ryot* for the sole purpose of giving the land to another, would be vesting him with a power to commit a wanton act of oppression from which he could derive no benefit." (Fifth Report, 615.) By Section 67, Regulation VIII, 1793, *zamindars* are still bound by the conditions in their *kabuliyats*, and one of these conditions was that the *ryots* were on no account to be dispossessed from their tenures whilst they performed the conditions of them, and whilst the terms of their tenures were unexpired. (II Harington, 254.)

"*Fourthly.*—Leases of lands whereon dwelling-houses, manufactories, or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk. * * * *

"Provided always that nothing in this Section contained shall be construed to entitle any such purchaser as aforesaid to eject any *ryot* having a right of occupancy at a fixed rent, or at a rent assessable according to fixed rules under the laws in force." * *

Section 52 of the same Act provides that the purchaser "of an estate in a district not permanently settled, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement, and shall be entitled to avoid and annul all tenures which may have originated with the defaulter or his predecessors, being representatives or assignees of the original engagor, as well as all agreements with *ryots* or the like settled or accredited by the first engagor or his representatives subsequently to the last settlement, as well as all tenures which the first engagor may, under the conditions of his settlement, have been competent to set aside, alter, or renew. Saving always and except leases of lands whereon dwelling-houses, manufactories, or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk, which leases or engagements shall, so long as the land is duly appropriated to such purposes, and the stipulated rent paid, continue in force and effect."

As to the persons who are to be deemed auction purchasers under these Sections, Section 53, provides that "excepting sharers in estates under *butwarra* who may have saved their shares from sale under Sections 33 and 34, Regulation XIX, 1814, and sharers with whom the Collector, under Sections 10 and 11 of this Act, has opened separate accounts, any recorded

or unrecorded proprietor or co-partner who may purchase the estate of which he is proprietor or co-partner; or who, by re-purchase or otherwise, may recover possession of the said estate after it has been sold for arrears under this Act; and likewise any purchaser of an estate sold for arrears or demands other than those accruing upon itself, shall, by such purchase, acquire the estate subject to all its encumbrances existing at the time of sale, and shall not acquire any rights in respect to under-tenants or *ryots* which were not possessed by the previous proprietor at the time of the sale of the said estate." By Section 54, "when a share or shares of an estate may be sold under the provisions of Section 13 or Section 14 (*a*), the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners." These provisions set at rest several disputed questions (*b*). Purchasers of estates at sales in execution of decrees take the estate with all its encumbrances, as they purchase only the "right and interest" of the judgment-debtor, and therefore all encumbrances created by him are binding upon them (*c*). When an auction purchaser restored the estate to the defaulter, it was held that the latter could not cancel leases (*d*). But a stranger purchasing from an auction purchaser may exercise the power of cancelment (*e*). If the defaulter purchases the estate, which he may do under

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(*a*) The portion of the estate separated off, and the remaining share from which it was separated, are both "shares of an estate" within the meaning of this Section. *Manohar Mukerjya*, H. C., 19th August, 1864, For an instance of a suit by the purchaser of such a share to set aside a collusive lease, see *Manohar Mukerjya*, H. C., 4th January, 1866.

(*b*) See S. D, 1849, 70, 488; VII S. R., 516, V Moore, 447.

(*c*) Section 3, Regulation XVIII, 1812; R. S. C., 30th June, 1841, S. D., 1851, 72; 1852, 501; C. O., 10th June, 1842.

(*d*) S. D, 1850, 327.

(*e*) II Sevestre's cases, 325.

the present law, former encumbrances still attach (*a*). When a man acquired an estate partly by a private purchase and partly by purchase at a sale for arrears of revenue, it was held that he might set aside the portion of a dependent *taluk* covered by the portion of the estate sold for arrears, but not the whole of it (*b*). A sale under Regulation XI, 1796, does not extinguish under-tenures (*c*).

Obsolete exemptions.—In addition to the tenures and leases expressly exempted from cancelment by Section 37, certain other classes of holdings have been sometimes declared to be exempt from cancelment. There is an old Government order to the effect that Section 10, Regulation I, 1793, and Section 6, Regulation XLIV, 1793, recognise a right in every proprietor of land to dispose of part of his lands as a dependent *taluk*, and therefore *taluks* created since the settlement confer a right of occupancy in perpetuity at *pergunnah* rates, even though the estate of the grantor should be sold for arrears of revenue (*d*). But this was before the enactment of Regulation XI, 1822, and of course does not hold good now. It is always held that a mere claim to hold as *talukdar* under a lease granted since the permanent settlement, will not hold good against an auction purchaser. When a *chur*, which had been temporarily settled, was sold for arrears, it was held that, though the purchaser could not eject the *ryots* who were in possession when the *chur* was settled, he might eject the middlemen (*e*). When a *mehal* was settled with a farmer in consequence of the recusancy of the proprietors, and they set up a *talukdari* title, it was held that he might oust them from all such lands, as they did not cultivate as *ryots* (*f*). There are several cases which go to show that

(*a*) S. D, 1850, 109.

(*b*) II S. R, 80. But under Section 51, Act XI, it would now be otherwise.

(*c*) *Jagamohan Bakhshi*, Sutherland, P. C., 673.

(*d*) G. O, 15th December, 1799. Peters, 12.

(*e*) S D., 1859, 1856.

(*f*) S. D, 1855, 584.

disseised *zamindars* cannot be ejected from their *nij jote* or *sir* lands by auction purchasers. There is an old ruling of the Board of Revenue, to the effect that a defaulter, ousted at a sale for arrears of revenue, retains a right of occupancy in his homestead, subject to the payment of a fair rent to the purchaser (*a*). But it has been held by the Agra and Calcutta Courts, that when the estate of a proprietor is sold, his whole rights, as proprietor and cultivator, are extinguished, and he is liable to be ejected by the purchaser from his *sir* lands (*b*). In another case, the Agra Court held that a farmer of an estate leased for arrears of revenue cannot recover from the excluded *zamindars*, on account of their *sir* land, more than the amount entered in the rent-roll as the *sir* rates, unless such rent have been fixed in the manner directed by Sections 7 and 10, Act I, 1841 (*c*).

Postponing ejectment till the end of the year.—Clause 3, Section 23, Regulation VII, 1799; Section 24, Regulation V, 1800; and Section 9, Regulation 1, 1801, contain certain provisions for suspending the annulment of leases, supposing the sale to have taken place after the expiration of the second month of the Bengal or *Fusli* year, until the close of the year, except in cases in which they may appear to be obviously collusive; and Section 4, Regulation V, 1812, provided that no leases whatever should be annulled in the middle of the year on the ground of collusion, without a decision to that effect in a Court of Judicature, the case being

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(*a*) R. B., 4th February, 1835. See V. N. W. P., 114; S. D., 1858, 886. Similarly, a disseised *lakhirajdar* has been held to have a right of occupancy in his *sir* lands after resumption. S. D., 1858, 346. But *lakhirajdars*, who held without title altogether, have no such right. *Ramchunn Banerjya*, 28th July, 1862.

(*b*) *Jawala Singh*, N. W. P., 31st August, 1863. *Tilutloma Debya*, H. C., 28th November, 1867. Other cases on the subject not clearly reported are *Ram Naraian Singh*, N. W. P., 10th August, 1861; *Chowhar Jadyal Tewari*, 20th May, 1864.

(*c*) *Ganesh Pershad*, N. W. P., 25th January, 1864.

tried as a summary suit under Regulation VII, 1799. It is not clear whether these provisions are still in force (*a*).

Waiver of cancelment.—The general rule is that if, after a tenancy has been determined by forfeiture for any cause, the landlord receives *subsequent* rent, or does any other act recognising the tenancy as still existing, he is deemed to have waived the forfeiture, and cannot eject the tenant. But in the case of cancelment of tenancy by an auction sale of the parent estate for arrears, it has been held that an auction purchaser may accept rents, and do other acts which are usually held to amount to a waiver of forfeiture without being precluded from afterwards ejecting the tenant. Thus when an auction purchaser issued notice of enhancement to an *ijaradar*, he was allowed afterwards to sue for possession of the farm (*b*). When an auction purchaser received several instalments of rent from a tenant at the rate specified in his *mukarrari pottah*, the Court said this was no confirmation of the lease, as a purchaser is not bound to refrain from receiving rents until he has had leisure to look into all the under-tenures on hisestate (*c*). In another case it was held that an auction purchaser who, on the first assumption of his rights as *zamindar*, sued an alleged *miras pottahdar* at the rate mentioned in the *miras pottah*, as being the rent paid in previous years, could not be considered to have thereby confirmed

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(*a*) The rule of English law is that when the tenancy is determined unexpectedly without any fault of the tenant, he has a right to enter and take the "emblements" or crops growing on the land, and in some cases an extended occupation is allowed by the Statutes 14 and 15 Vic., Cap. 25, Section 1, as an equivalent for this right. Smith, 218, 256.

(*b*) S. D., 1854, 45.

(*c*) *Radhakant Dutt*, H. C., 21st January, 1864. See *Jotendro Mohan Thakur*, 3rd May, 1864, IV, S. R., 179; S. D., 1858, 930; S. D., August, 1860, 113. In the case of *Jugadishwari Dasya*, H. C., 8th March, 1967, it was held, that an auction purchaser, by receiving rent from a tenant, had precluded himself from enhancing the rent.

it (*a*). In a case heard by the Privy Council, the parent estate had been sold for arrears before the passing of Regulation XI, 1822, and a purchaser from the original auction purchaser of the estate brought a suit to enhance the rent payable by a *talukdar* holding under a *mukarrari pottah*, which rent had been regularly accepted by the original auction purchaser. The Council observed:—"The respondent contends that, by the operation of the words 'stand cancelled from the day of sale' in Section 5, Regulation XLIV, 1793, the existing interest of the *talukdar*, *ipso facto*, ceased to exist without any act being done by the purchaser; that it was incapable of confirmation, or of being set up by him or his successors; and that where, from the acquiescence of the purchaser, or of those claiming under him, the possession had remained in the *talukdar* undisturbed, and the original rent had been received, no matter for how long a period, or through whatever number of *mesne* conveyances, it still remained a bare possession at the will of the *zamindar* for the time being, and the rent always liable to enhancement. In this hard and liberal construction of the words cited above, their Lordships do not concur." The Council further observed that Regulation XLIV, 1793, only allowed auction purchasers to demand a fair rent in lieu of that paid under the cancelled engagement; and as there was nothing to show that the original rent was not a fair one at the time of the sale, it was held that long-continued receipt of the rent by the auction purchaser, at the rate mentioned in the *pottah*, precluded his representative from setting it aside (*b*). But in a case decided by the High Court, in which the representative of an auction purchaser at a sale under Regulation XI, 1822, sued to enhance

(*a*) *Ram Sunker Sen*, II. C., 23rd August, 1865.

(*b*) *Rani Surnamoye*, Sutherland, P. C., 548. In this case a doubt was raised as to whether the power of cancelment is given only to the purchaser or to him and his heirs, or whether it is a power attaching to the *zamindari*, and passing to subsequent purchasers.

the rent paid by a middleman under an old *mukarrari pottah*, the Court said that the right of an auction purchaser to enhance and cancel leases, though not enforced by the original purchaser, may be revived at any time by a subsequent proprietor (*a*), as it has always been held since the case of *Digamber Mitter* in 1850 that the right to enhance or assess is a constantly recurring cause of action. But in another recent case it was said that an auction purchaser, at a sale of a *putnee* for arrears, waives his power of cancelling leases if he does not exercise it within a reasonable time after the sale (*b*).

Limitation.—By Section 7, Act XIV, 1859:—"In suits to avoid under-tenures in an estate sold for arrears of Government revenue due from such estate, or in a *putnee taluk*, or other saleable tenure sold for arrears of rent, which, by virtue of such sale, becomes freed from incumbrances and under-tenures, the cause of action shall be deemed to have arisen at the time when the sale of the estate, *taluk*, or tenure, becomes final and conclusive" (*c*). Mr. Macpherson says: "Since all property comprised in the decennial settlement is considered as perpetually hypothecated to Government for the revenue assessed thereon, a sale for arrears of revenue transfers to the purchaser all the property and privileges which the engaging party possessed and exercised at the time of settlement, free not only from subsequent incumbrances or transfers by the party engaging, and those who claim under him, but also from the consequences of his or their omissions" (*d*). For this reason the purchaser does not claim under the person whose estate is sold; decrees against the latter are not binding against him (*e*), and he may

(*a*) *Satya Churn Ghosal*, H. C., 3rd August, 1865. But see Section 7, Act XIV, 1859.

(*b*) *Uma Churn Rai*, H. C., 17th April, 1866.

(*c*) This limitation probably applies only to suits for ejectment, and not to suits for enhancement.

(*d*) Civil Procedure, 54.

(*e*) S. D., 1851, 117, 625, 731; 1852, 918, 1040, 1853, 112, 835, 1854, 230.

recover land belonging to the estate purchased by him, although it may have been held without claim or dispute on the part of the former *zamindar* for a period of more than twelve years (*a*). So too the purchaser of a *putnee taluk* at a sale for arrears succeeds to all the rights of the *putneedar* at the date of the creation of the *putnee*, irrespectively of any length of intermediate possession by any party (*b*). No length of possession previous to the sale, it has been said, will entitle an under-tenant, not of the protected classes, to hold on as against an auction purchaser at a sale for arrears of revenue or rent (*c*). The cause of action accrues on the day of the sale becoming final, and an auction purchaser is not bound to wait for his rent before clearing away incumbrances (*d*). Notice previous to ejectment by an auction purchaser is not necessary (*e*).

Protection from cancelment by registration.—By Sections 38 and 39, Act XI, 1859, *taluks* and similar tenures created since the time of settlement, and held immediately of the proprietors of estates and farms for terms of years so held, may be registered either in the "Common Register," which will secure them against any auction purchaser but the Government, or in the "Special Register," which will secure them against all purchasers, including Government. By Section 51, if a sale take place pending the enquiry by the Collector, the tenure or farm shall be protected during the enquiry, and shall be protected eventually by registration if the final award of the Collector be in favor of the claimant. By Section 40, persons desiring to register their *taluks* or farms must present a petition to the Collector, containing the particulars of the tenure or farm. By Section 2, Act

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(*a*) S. D., 1852, 821; 1849, 203; 1857, 333, 1524. But see S. D., 1850, 491, 1846, 353; 1849, 411, 1853, 778, 1856, 953; 1857, 152.

(*b*) S. D., 1850, 319.

(*c*) S. D, 1852, 968, 965, 1853, 514, 1857, 207, 333, 1856, 617, 666.

(*d*) *Jotendro Mohan Thakur*, H. C, 3rd May, 1864.

(*e*) S. D, 1855, 337.

III, 1862, B. C., the application must be presented within three months from the creation of the tenure or farm, along with the fees, which are 3 *per cent* on the rent up to Rupees 1,000, and 1 *per cent.* on all above that amount. By Sections 41 and 42, Act XI, 1859, on presentation of the application notice will be given to the lessor, and another notice with a copy of the application will be fixed up in the Collector's Office, and at the *Mal Cutcherry*, requiring all persons interested in the matter to make their objections within thirty days; and if any reasonable objection be made, the applicant is to be referred to the Civil Court. If the application be for special registry, the Collector shall cause any enquiry that he may deem necessary for the security of the revenue to be made, and report his opinion to the Commissioner. By Section 43, building leases may be registered in the same manner. By Section 44, tenures existing at the time of the permanent settlement may be registered, and, when so registered, shall be entered only in the "Special Register." But Section 2, Act III, 1862, B. C., declared that all applications under this Section were to be made within three years of the passing of that Act, so that they cannot be received at the present time. By Section 46, Act XI, 1859, the applicant must pay the expenses of measurements and local enquiries. By Section 47, no Civil Court shall be competent to order registration in the "Special Register." But the refusal of the Collector to register shall not affect the title of the holder. By Section 48, suits may be brought for cancelment of registration. By Section 49, orders are appealable in the usual way. By Section 50, entry in the "Special Register" shall be an effectual protection, unless, in a suit instituted by Government in a Civil Court within the period allowed for suits for the recovery of the public revenue (*a*), a decree be passed,

(*a*) By Clause 1, Section 2, Regulation II, 1805, the limitation of twelve years is not applicable to any suits by Government for the recovery of revenue or for any public claim or right whatever. By Clause 2, all claims for assess-

pronouncing the registration to have been obtained by fraud. In such case, the tenure, if in the hands of a *bonâ fide* purchaser for value, shall not be avoided by reason of such fraud, but shall be assessed with a fair rent.

Protection from cancelment by paying the arrears.—Under Section 9, Act XI, 1859, an under-tenant may avert the sale of the parent estate by paying the arrear himself, and may thus protect his own tenure or farm from cancelment. The tenant may afterwards recover the amount as an ordinary debt by suit in the Civil Court, but he has no lien on the estate (*a*).

Cancelment by sale of Putnee Taluks.—By Section 11, Regulation VIII, 1819, *putnee taluks* sold for arrears are sold free of all encumbrances that may have accrued upon them by the act of the defaulter, unless the right of making such encumbrances shall have been expressly vested in the holder. All leases originating with the defaulter, *if creative of a middle interest between the resident cultivators and the late proprietor*, are cancelled by the sale, except the authority to grant them should have been specially transferred, and the holders are liable to ejectment, their rights having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, the whole of which was liable for the rent. But *khudkasht ryots*, or resident and hereditary cultivators, cannot be ejected, nor can *bonâ fide* engagements made with them be cancelled, unless it be proved in a regular suit that a higher rent would have been demandable at the time such engagements were contracted. By Section 12, it is provided that private transfers of *putnee taluks* by sale, execution of decree, or

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ment of *lakhiraj* land, for the recovery of arrears of revenue, or for any other public right whatever (for which no special limitation is provided), are to be heard if preferred within sixty years. By Section 17, Act XIV, 1859, this provision is still in force. See *Burdwan Raja's* case, IV Moore, 466; S. D., 1855, 199.

(*a*) *H. Fagan*, H. C., 15th December, 1862. See S. D., 1856, 867; 1859, 515.

surrender to the *zamindar*, shall not involve a cancelment of the under-tenures. It would seem from these provisions, that an auction purchaser, at a sale for arrears, takes the *putnee* free from all intermediate under-tenures and encumbrances, whether *durputnees* or farms, not attaching to it at the time of its creation; and this was the view formerly taken. But, in a recent case, it was said that the purchaser is only empowered to cancel a particular class of leases, when such leases have been created by the last defaulter (*a*). Leases to resident cultivators are not subject to cancelment, but a purchaser may sue to set aside such a lease on the ground of collusion (*b*). When a *zamindar* created *a putnee* out of two existing *durputnee taluks*, and, on the *putnee* being sold for arrears, bought it herself, she was not allowed to cancel the *durputnees*, as they had not been created by the defaulter (*c*). A defaulter purchasing *benami*, in contravention of the law, cannot cancel leases (*d*).

Protection from cancelment.—By Section 13, Regulation VIII, 1819, when a *putnee* is advertised for sale, the *talukdars* of the second degree may stay the sale by paying into Court the amount of balances that may be declared due by the *zamindar's* agent on the day of sale; and in like manner they shall be entitled to lodge money antecedently, for the purpose of answering any demand that may remain due on the day of sale, and should the amount lodged be sufficient, the sale shall be stayed If the amount so lodged shall be rent due from the *durputneedar* to the *putneedar*, the same shall be stated at the time of making the deposit, and the amount shall be carried to the tenant's rent account. If the *durputneedar* shall have already paid his rent in full, so that the amount lodged is an advance from private funds, such deposit shall be deemed a loan to the

(*a*) *Ishan Chunder Kur*, H C., 18th August, 1863.
(*b*) S. D , August, 1860, 190
(*c*) S D., 1857, 1310 See S. D , 1858, 369.
(*d*) Constr., 1243.

putneedar, and the *durputneedar* making it shall be deemed to have a lien upon the *putnee taluk* in the same manner as if the lease had been made upon mortgage, and he shall be entitled to obtain immediate possession of the *taluk* in order to recover the amount advanced from its profits. The *putneedar* shall not be entitled to recover possession till the entire amount, with interest at 12 per cent., has been liquidated, either by payment in cash, or from the usufruct of the land. In order to stay a sale, the money must be actually produced and lodged with the Collector. A mere offer to pay is not sufficient (*a*). The Collector cannot refuse to take the money, and stay the sale (*b*). The money must be lodged antecedently to the sale, or at least before the lot has been called up (*c*). The right of paying the arrear and staying the sale is confined to *durputneedars*, and cannot be claimed by a mortgagee of a *durputnee taluk* who is not in possession (*d*). It has been said that this exclusion of the mortgagee from the rights of the mortgagor is based on a very narrow construction of the Regulation; but the ruling may perhaps be justified on the ground of the landlord's not being obliged to recognise unregistered assignments of the tenant's interests (*e*). When a *durputneedar* has got possession of the *putnee* under this Section, a sharer of the defaulter can recover no portion of the *putnee taluk* till the whole arrear is paid (*f*). The *durputneedar* is not bound to avail himself of his lien, as he may sue for the amount as an ordinary debt (*g*). It has been held that when an arrear has been decreed to be due from a *putneedar*, the *durputneedar* has the right of paying it (*h*), as Clause 3,

(*a*) S. D., 1856, 330, 733.
(*b*) Precedent 8, 1851.
(*c*) Board's Rules, Chapter XVI, Section X, Clause 3.
(*d*) S. D., 1857, 1195.
(*e*) See cases quoted in Chapter VI under form of assignment by tenant.
(*f*) S. D., 1858, 890.
(*g*) S. D., 1849, 473.
(*h*) S. D., 1858, 1415.

Section 2, Regulation I, 1820, extends the provisions of Section 13, Regulation VIII, 1819, to sales of *putnee taluks* after decrees.

Cancelment by sale of parent tenure.—The old law was not very clear as to whether the sale of an ordinary tenure for its own arrears cancelled the under-tenures. The question was once put to the Sudder Court, and in Construction 502 they refused to admit this mode of cancelment, and ruled that the lessee of a defaulter could be ejected only when he defaulted with his own rent. In one case, when a *ganthi* tenure had been sold for arrears, it was said that this did not involve the cancelment of the *darganthi* tenure, as that was not an intermediate tenancy within the scope of Section 11, Regulation VIII, 1819 (*a*). In another case, the purchaser of an *ausat* tenure sold for its own arrears was not allowed to cancel under-tenures created by the defaulter (*b*). In a recent case, the Court said that only the rights and interests of the defaulter were sold under Act VIII, 1835, and therefore a purchaser at a sale under that law could not cancel under-tenures (*c*). But, in other cases, it is said that the purchasers of tenures sold under Act VIII, 1835, for their own arrears, acquired them, as originally created, free of all encumbrances (*d*). Purchasers of *mukaddami* tenures in Cuttack, sold for arrears, can set aside fixed rent leases granted by the defaulter (*e*). And in another case it was said that purchasers of a *taluk* may oust *shikmi talukdars* (*f*). This matter has now been set at rest by Section 16,

(*a*) S. D., 1851, 626. See a *dictum* of Mr. J. Sconce, S. D., 1859, 389.

(*b*) S. D., 1849, 31

(*c*) *Manik Chunder Dass*, H. C., 13th April, 1863. This seems to be a mistake. See cases cited under "Landlord's lien," in Chapter III. Act VIII, 1835, superseded the substantive law, Regulation VII, 1799, *Kishwar Mohunt*, H. C., 25th March, 1867.

(*d*) *Cohn, Fielman and Co.*, H. C., 14th January, 1862; *Dwarkanath Dass*, 16th August, 1865.

(*e*) S. D., 1850, 398

(*f*) S. D., 1852, 470. See also *R Savi*, S. D, 21st April, 1859, S. D., 1857, 1071, 1858, 930. *Hari Charn Bose*, H. C., 30th March, 1867.

Act VIII, 1865, B. C., which provides that "the purchaser of a tenure sold under that Act shall acquire it free of all encumbrances which may have accrued thereon *by any act of any holder* of the said under-tenure, unless the right of making such encumbrances shall have been expressly vested in the holder by the written engagements under which the under-tenure was created, or by the subsequent written authority of the person who created it, his representatives or assignees. Provided that nothing herein contained shall entitle the purchaser to eject *khudkasht ryots* or resident and hereditary cultivators, nor to cancel *bonâ fide* engagements made with such *ryots* by the late incumbent of the under-tenure, except it be proved in a suit that a higher rent would have been demandable at the time such engagements were contracted. Nothing in this Section shall apply to the purchase of a tenure by a previous holder thereof through whose default the tenure was brought to sale." It has been lately held by a Full Bench, that tenures sold under Section 105, Act X, 1859, before the passing of Act VIII, 1865, passed free of incumbrances only, when the right to sell them for arrears was specially reserved in the leases creating such tenures. Tenures saleable by the custom of the country only, did not pass free of incumbrances (*a*).

Protection of under-tenures from cancelment.—By Section 6, Act VIII, 1865, B. C., persons interested in the protection of under-tenures, may pay into Court the amount decreed to be due from the holder of the superior tenure, and the provisions of Section 13, Regulation VIII, 1819, shall be applicable to payments under this Section.

Enforcement of cancelment.—Since ejectment of under-tenants whose tenures are cancelled by the sale for arrears of the

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(*a*) *Shahabudin*, H. C., 15th March, 1867, F. B.; *Bindabun Chowdhari*, 7th December, 1867. In this case it is said that *ryoti* tenures are protected from cancelment. A tenant thus ejected is not, however, entitled to retain possession of his homestead.

parent estate or tenure is an "ejectment expressly authorized" by the Sale Acts, it would seem that it might be enforced under Section 25, Act X.

Other modes of cancelment.—Tenures created by a *lakhirajdar* are, as a general rule, voided on resumption of the *lakhiraj* land (*a*). But this is not the case if the possession of the *lakhirajdar* be not disturbed (*b*). In a recent case, it is said that resumption of the parent tenures does not necessarily annul under-tenures (*c*). It has also been held that tenures created by holders of service tenures are voided when the service tenures are set aside on account of the services being no longer required (*d*). Persons who have held for any length of time under *pottahs* alleged to be invalid or collusive, cannot be summarily ejected (*e*).

Forfeiture of tenancy by disclaimer.—The rule of English law is, that a tenant renders his tenancy liable to forfeiture if he disclaims his landlord's title. A "disclaimer" is said to be a renunciation by the lessee of his character of tenant, either by setting up title in a third person, or by claiming title in himself. But a disclaimer by mere word of mouth is not sufficient to work a forfeiture (*f*). In a case decided in 1859, a doubt was raised whether this doctrine was applicable in this country (*g*). But, in a more recent case, it appears to be assumed that it is applicable. A *ryot* took a *pottah* from a third party, and under that set up a hostile title against his landlord, and it was

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(*a*) S. D., 1850, 168; 1860, 660; *Madan Mohan Banerjya*, H. C., 25th July, 1864.

(*b*) S. D., 1853, 621.

(*c*) *Furzal Banu*, H. C., 10th July, 1865.

(*d*) S. D., 1846, 216; 1848, 303.

(*e*) *Thakur Dass Muzumdar*, H. C., 6th January, 1865; VII, S R., 37; S. D., 1855, 584.

(*f*) Smith, 234.

(*g*) S. D., 1859, 843.

decided that this amounted to a disclaimer, and forfeiture of all his rights of occupancy (*a*).

FORFEITURE ON ACCOUNT OF NON-PAYMENT OF RENT OR BREACH OF CONDITIONS.

Non-payment of rent.—By Section 21, Act X, "when an arrear of rent remains due from any *ryot* at the end of the Bengal year, or at the end of the month of *Jeyth* of the *Fasli* or *Wilayati* year, such *ryot* shall be liable to be ejected from the land in respect of which the arrear is due. Provided that no *ryot* having a right of occupancy or holding under a *pottah*, the term of which has not expired, shall be ejected otherwise than in execution of a decree or order under the provisions of this Act." And by Section 22, Act X, "when an arrear of rent shall be adjudged to be due from any farmer or other lease-holder, not having a permanent or transferable interest in the land, the lease of such lease-holder shall be liable to be cancelled, and the lease-holder to be ejected. Provided that no such lease shall be cancelled, nor the lease-holder ejected, otherwise than in execution of a decree or order under this Act." It should be observed that *ryots* can be ejected only if an arrear be due at the end of the year. They cannot be ejected for arrears due for the first six or even ten months of the year (*b*). On the other hand, a farmer or other middle-man lease-holder is liable to be ejected at any time when an arrear is decreed to be due from him. If, however, the lease be one conveying a permanent transferable interest, or, in other words, a tenure, the lessee cannot be ejected, but his tenure must be sold (*c*). A *ryot* with right of occupancy, even though he fail to pay the enhanced rent demanded by notice,

(*a*) *Nadir Beg*, H. C., 4th January, 1865. See *Shib Prasad Chuckerbutty*, 9th June, 1864.

(*b*) *R. Savi*, H. C., 13th March, 1863, *Ramjiwan Dass*, 5th August, 1863.

(*c*) *Nandlall Ghose*, S. D., 31st December, 1860, *Ram Kissen Dass*, 26th March, 1862.

cannot be ejected for such arrears until the legality of the demand has been tested by suit (*a*). A *khudkasht ryot* in arrear with his rent cannot be ejected without a suit (*b*). As before stated, if the landlord accepts rent for the year following the one in which his right to eject the tenant accrued, he is presumed to have waived the breach, and cannot afterwards eject the tenant (*c*).

Suit to eject for non-payment of arrears.—By Clause 5, Section 23, Act X, "all suits to eject any *ryot*, or to cancel any lease on account of the non-payment of arrears of rent," are cognisable solely by the Collector (*d*). By Section 78, Act X, "any person desiring to eject a *ryot* or to cancel a lease on account of non-payment of arrears of rent, may sue for such ejectment and cancelment, and for recovery of the arrear, in the same action, or may adduce any unexecuted decree for arrears of rent as evidence of the existence of such arrear in a suit for such ejectment or cancelment. In all cases of suits for the ejectment of a *ryot*, or the cancelment of a lease, the decree shall specify the amount of the arrear; and if such amount, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed." By Section 41, the plaint shall describe the extent, situation, and designation of the land, farm, or tenure, and, if necessary for the identification of the land, the boundaries shall be given. *Ryots* may sue their under-tenants under this Section (*e*). In order to maintain a suit under this Section, the party seeking to eject must be the person entitled to receive rent from the defendant. Persons who have

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(*a*) S. D., 1850, 8.

(*b*) S. D., 1853, 301.

(*c*) *Pir Baksh*, H. C., 28th July, 1862.

(*d*) Under the old law, summary suits for ejectment were heard by the Judge under Section 15, Regulation VII, 1799. See I. S. R., 206.

(*e*) *Tarakant Bhattacharjya*, H. C., 17th May, 1867.

mortgaged their estates with possession cannot sue (*a*). A suit will not lie in the Collector's Court to cancel a *zaripeshgi* lease (*b*). A suit to eject a *ryot* in a joint undivided estate will not lie unless all the sharers join; one sharer cannot sue to eject a *ryot*, so far as his own interest goes (*c*), since a sharer in a joint undivided estate cannot claim specific lands as belonging to his fractional share (*d*). But these rulings do not apply to cases in which there has been a private partition, and the *ryot* cultivates separate and distinct plots under each sharer. A suit for arrears of house rent, and for ejectment of the tenant from the house, cannot be heard by the Collector (*e*). To sustain a suit under this Section, the relation of landlord and tenant must be alleged and proved. Thus, a tenant who, after executing a *kabuliyat*, ceases to pay rent, and sets up an adverse title, should be sued in the Civil Court (*f*). A suit by a landlord to eject an assignee of a tenant, whose tenure he does not admit to be transferable, lies in the Civil Court, and not under this Section (*g*). But the *zamindar* cannot get rid of the jurisdiction of the Revenue Courts merely by refusing to accept rent from his tenant, or refusing to acknowledge his title (*h*). A third party claiming as tenant cannot intervene in a suit of this nature (*i*). But a transferree of a transferable tenure may pay up the amount decreed and so stay ejectment (*j*).

(*a*) *Dilsukh Rai*, N. W. P., 5th May, 1866.

(*b*) *Muhammad Ali*, H. C., 30th August, 1864; *Ratan Singh*, 8th August, 1867.

(*c*) III, S. R., 159; VII, S. R., 58; S. D., 1847, 536.

(*d*) S. D., 1852, 845.

(*e*) *Muhammad Khan Kuzilbash*, S. D., 28th June, 1862.

(*f*) *Shib Prasad Chuckerbutty*, H. C., 9th June, 1864.

(*g*) *Taramani Dasya*, H. C., 8th September, 1864.

(*h*) *Thakur Dass Muzumdar*, H. C., 6th January, 1865.

(*i*) *Shaikh Salim*, H. C., 20th March, 1863.

(*j*) *Saroda Prasad Rai*, H. C., 13th April, 1863.

As to the decree, it has been held that the relief granted by the last paragraph of Section 78 extends to all leases (*a*). The provision as to fifteen days does not prevent the Court from giving further relief, if it think proper (*b*). If the decree, by an oversight, do not direct ejectment, it cannot be enforced (*c*). If the decree for ejectment be not executed, a suit will lie for a fresh *kabuliyat* (*d*). Ejectment under this Section does not necessarily bar a suit under Clause 6, Section 23, Act X (*e*). The Agra Board has ruled that copies of all decrees for ejectment or cancelment of leases should be sent to the Registrar, in conformity with Sections 61 and 42, Act XX, 1866 (*f*). In all such decrees, the amount in arrear must be specified, as the omission to do so vitiates the order of ejectment (*g*). An offer of payment of the arrear is insufficient to stay ejectment; the amount due, with costs, must be actually paid into Court within fifteen days from date of decree (*h*). The appeal in these cases lies to the Judge, whatever the amount of the arrear may be (*i*).

Breach of conditions.—A "condition" is defined to be some quality annexed to an estate whereby it may be defeated, enlarged, or created upon an uncertain condition (*j*). "Conditions precedent" are those which must be performed before an estate can commence: for instance, where an agreement to grant a lease was incomplete, and conditional on an advance being

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(*a*) *D. Fitzpatrick*, H. C., 6th September, 1866.

(*b*) *Nabu Kishta Mukherjya*, H. C., 18th September, 1866. The Agra Board has ruled contrariwise. Rule 16.

(*c*) *R. Savi*, H. C., 18th March, 1864

(*d*) *Kali Charn Banarjya*, H. C., 3rd January, 1867.

(*e*) *Amrit Lall Banarjya*, H. C., 9th January, 1867.

(*f*) Rule 27.

(*g*) *Bhima*, N. W. P., 3rd December, 1864.

(*h*) *Ram Harak*, N. W. P., 30th June, 1864.

(*i*) *Kala Chand Chuckerbutty*, S. D., 26th June, 1862; *Kalibur Upadhya*, H C., 22nd June, 1864.

(*j*) Smith, 105.

made to meet pressing demands within eight days (*a*). "Conditions subsequent" are those which enlarge or defeat an estate, or (as is said in Indian law) an "interest" already created. If A were to make a lease to B for seven years, in consideration of an advance from B, upon condition that if the advance were not repaid by the end of the term, the lease should be renewed for a further period, here the condition would be one subsequent to the commencement of the estate, and its non-performance by the landlord would have the effect of enlarging the estate (*b*). So, again, if A were to make a lease to B for seven years, upon condition that if he fell in arrear, or assigned his lease to another person, the lease should become void, this would be a condition subsequent; for B could not default or assign the term till it was vested in him, and therefore his doing so would be an act subsequent to the commencement of the estate, and which would have the effect of defeating it (*c*). The conditions most often met with in leases are of the latter sort, and are inserted for the purpose of enforcing the due payment of the rent, and to restrain the tenant from assigning or underletting (*d*).

The condition for re-entry, in the event of the occurrence of an arrear, is one implied by law in the case of all non-heritable and non-transferable tenancies. When a *putnee* lease contained a condition for re-entry on the occurrence of an arrear, and the *zamindar*, instead of enforcing this condition, sold the *taluk* under Regulation VIII, 1819, it was held that the condition was waived for ever, and could not be enforced against the purchaser, because he purchased the tenure itself, and took it subject only to its ordinary liabilities as recognised by law (*e*).

(*a*) *G. F. Fischer*, Sutherland, P. C., 395.

(*b*) VI, S. R., 167

(*c*) See S. D., 1858, 297.

(*d*) Smith, 112.

(*e*) *Dindyal Paramanik*, H. C., 10th January, 1863.

It appears from some cases, that the condition that the lease should be void if assigned without licence, is implied by law in all farming tenancies (*a*). It is a rule of English law, that this condition is not broken by an assignment by operation of law: as for instance by sale in execution of a decree (*b*); for in this case the assignment is not the act of the tenant, but of the law. Nor is it broken by a transfer by inheritance (*c*). But it should be observed, that a mere prohibition to assign does not amount to a condition for re-entry on assignment. When a tenant assigns in violation of such a prohibition, the landlord may sue him for damages for breach of contract, or may refuse to recognise the unlicensed transferree, and hold the original lessee still liable for the rent. But he cannot treat the tenancy as forfeited (*d*).

A *mukarrari* lease granted subject to resumption on certain conditions may be resumed on the occurrence of those conditions (*e*). A condition for forfeiture in a *jungleburi* lease was held to override Section 8, Regulation VIII, 1793 (*f*). If the *pottah* contains a condition for forfeiture, it may be enforced even though the tenure be saleable (*g*).

When a lessee fails to furnish fresh security, under the terms of his lease, upon the death of the original surety, this amounts to a breach of the conditions of the lease, working a forfeiture (*h*). It has been said that in strict law a farmer forfeits his lease by the withdrawal of the personal security given by him at the time of taking the farm, but cases of forfeiture are

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(*a*) S. D., 1859, 514. But the Agra Court has held that this condition is not implied by law. *Sadut Ali*, N. W. P., 15th February, 1866.

(*b*) Smith, 115

(*c*) S D., 1859, 138

(*d*) S. D., 1858, 297, 1859 705, Hay's Reports, 1862, 62.

(*e*) S D., 1853, 678.

(*f*) II, S. R., 49.

(*g*) *Jai Durga Debya*, H C., 15th April, 1863

(*h*) S D, 1845, 178, II Sevestre's Cases, 273

not to be favoured when no injury has resulted, or when a money compensation is a sufficient remedy (*a*).

When there was a condition in the lease for forfeiture, in the event of the lessee underletting his term, and the lessee placed the estate in charge of a manager under a *sanad*, which obliged him to pay a certain *juma* yearly, and allowed him to retain collections in excess of that amount, one Judge held that this did not amount to an under-lease, as it did not transfer to the manager the right of suing for the rents; while another Judge was of opinion that although the sub-lease was not so absolute and complete as to make the lease void, yet it was such a fraudulent evasion of the terms of the lease as to entitle the plaintiff to equitable relief, had he asked for it (*b*). When a lessee for life was restricted to the cultivation of indigo on pain of forfeiture, it was held that the condition was not broken by the growth of the grain necessary for the support of the cultivators (*c*).

In the case of *Alum Chunder Sha*, just quoted, it was sought to eject the tenant, partly on the ground of waste in cutting trees, but that point was not decided. It is sometimes said that *ryots* render their tenures liable to forfeiture by building without licence, but it has been recently decided that a *ryot* with a right of occupancy may build a brick-house upon his land (*d*). The old doctrine was, that a *ryot*, or under-tenant of any sort, has no right to diminish the rent-paying area of his landlord's estate without licence, and that his doing so amounts to a breach of the conditions of his tenancy, which renders it liable to forfeiture. The Agra Court has held that the plantation of trees in arable ground let out for ordinary cultivation,

(*a*) *Alam Chunder Sha*, H. C., 22nd March, 1864. But see Mr. Jackson's judgment in *Ram Kumar Bhattacharyya*, H. C., 6th February, 1867.

(*b*) S. C.

(*c*) V. S. R., 205.

(*d*) *Niyamatulla*, H. C., 3rd August, 1866. See *Hedaiyat-un-nissa*, H. C., 17th December, 1867.

without the permission of the lessor, amounts to a breach of contract, warranting the ejectment of the lessee from his entire holding (*a*). And when the *ryot* had planted a garden without licence, it was held that he had rendered himself liable to ejectment from his entire holding (*b*). Mr. Seton-Karr observes that it is the practice in Bengal for *ryots* to cut trees without obtaining permission from the *zamindar* (*c*). But, in Behar, the landlord's right to half of the produce of all fruit trees, whether planted by himself or by the tenant, is clearly recognized, and the landlord's permission is, it is believed, necessary before trees can be cut. Tenants cannot dig tanks or cut roads, without the *zamindar's* permission, in any part of the country. There is one instance of a suit against a *mukarraridar* for alleged waste in digging a well, in which it was held that the tenant, having an interest in perpetuity, had the right of doing anything which did not so entirely destroy the land as to endanger the ground rent (*d*.)

When a *ryot* had mortgaged his tenure, the Agra Court held that the landlord was entitled to be protected from any injury thence resulting, but said that, where there is no contract between the *zamindar* and the tenant other than what is implied by their relative positions, such a proceeding is not a breach of the conditions of any contract by which the tenant is liable to ejectment, and does not therefore constitute a cause of action under Clause 5, Section 23, Act X (*e*). A tenant is not liable to be ejected for a breach of any condition of his lease, unless it has been expressly stipulated that ejectment is to be the penalty of a breach of such condition (*f*).

(*a*) *Debi*, N. W. P., 20th November, 1865.

(*b*) *Muhammad Faiz Ali*, N. W. P., 8th December, 1862.

(*c*) Minute, dated 2nd June, 1864.

(*d*) *Dhanpat Singh*, H. C., 9th June, 1864.

(*e*) *Prasad Narayan Singh*, N W. P, 16th March, 1866

(*f*) *Guru Prasad Sircar*, H. C., 19th March, 1863.

Waiver of forfeiture.—If, after a condition has been broken, the lessor accepts rent which has become due since the breach, it is held that he thereby waives the forfeiture and recognises the tenancy as a continuing one, and cannot afterwards take advantage of the condition. In a leading case on the subject, Lord Mansfield said:—"To construe the acceptance of rent due since the condition broken a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had right to enter. He had full notice of the breach, and did not take advantage of it, but accepted rents subsequently accrued. That shows he meant that the lease should continue. Cases of forfeiture are not favoured in law, and where the forfeiture is once waived the Court will not assist it" (*a*). Nor is acceptance of rent due since the forfeiture, the only means by which a lessor may waive his right to take advantage of the forfeiture. It seems that any act on the part of the lessor, showing an unequivocal intention to treat the tenancy as continuing, such as distraining, has the effect of putting an end to his right to take advantage of the forfeiture (*b*). But it is said "that if the landlord brings an ejectment suit to enforce the forfeiture, or does any other unequivocal act indicating his intention to avail himself of the option given him to determine the lease, and this option is communicated to the lessee, the lease is determined, and the subsequent receipt of rent will not set it up again" (*c*). When a condition is continuing or recurring,—as, for instance, where there is a provision for ejectment on every default of payment,—

(*a*) *Goodright* v. *David*, Smith, 109. Of course, the rent by the receipt of which a landlord waives a forfeiture must be rent which became due *after the breach*, for it is clear that a landlord ought not to lose his right of putting an end to the tenancy by receiving a debt which became due at a time when nothing had happened to render the tenancy voidable. Smith, 110.

(*b*) Smith, 110, Goodeve on Evidence, 510.

(*c*) Smith, 10 note.

the waiver of one forfeiture does not prevent the landlord from taking advantage of a second breach (*a*).

Suits to eject, on the ground of breach of the conditions of any contract by which a *ryot* may be liable to ejectment, or a lease may be liable to be cancelled, are cognizable only by the Collector, under Clause 5, Section 23, Act X.

As to the decree in these cases, the old rule was, that when a lease contains an express condition for ejectment on the occurrence of an arrear, the lessor is entitled to take possession immediately upon the breach of the condition, as no subsequent intervention of judicial authority can revive the lease, which has become absolutely void (*b*). But Section 78 provides that, "in all cases of suits for the ejectment of a *ryot*, or the cancelment of a lease, the decree shall specify the amount of the arrear, and if such amount, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed;" and it has been held that all suits for ejectment, on the ground of a condition providing that penalty, in the event of an arrear, must be laid under Section 78, and the tenant allowed the fifteen days' grace (*c*). In a later case it was said:—"We are not prepared to put this case so high as it has been placed by that Bench of the Court which has already considered this question. We are inclined to think that parties may contract themselves out of the benefit of an existing law, provided the contract is not against *bonos mores*. We see no reason why the parties, if they choose to do so, may not contract for re-entry absolutely without being bound to proceed for ejectment under any enactment in force. But if the lease simply provides for re-entry on there being a default in the payment of the rent, the mode of re-entry being left uncertain, the re-entry must be effected under the law in

(*a*) *Mihr Chand Sahu*, H. C., 10th May, 1867.

(*b*) S. D., 1853, 678, 1875, 174, 256, July, 1860, 40.

(*c*) S. D., January, 1862.

force"(*a*). Thus, too, the Agra Court has held, that if there be a written condition that a *ryot* shall pay his rent by a certain date, or quit his holding, *authorizing* the *lumberdar* to make over the holding to another tenant, this removes the necessity for regular ejectment proceedings (*b*). In a late case the High Court ruled, that whether the liability to be ejected arises under Sections 21 and 22, or under a special condition of ejectment contained in the lease, the tenant is equally entitled to the fifteen days' grace (*c*). In another recent case, the plaintiff sued to cancel a *mukarrari* lease under a special condition therein contained, that he should be at liberty to cancel the lease and re-enter, if six successive instalments of rent remained unpaid. The tenants pleaded that they were entitled to the

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(*a*) *R. Solano*, H. C., 23rd December, 1862 ; *Guru Prasad Sircar*, H. C., 19th March, 1863.

(*b*) *Khushal Singh*, N. W. P., 13th May, 1864.

(*c*) *Muhammad Hosain*, H. C., 11th April, 1867. See *Alum Chunder Sha*, 22nd March, 1864. "In England, equity will relieve from a forfeiture caused by non-payment of rent on payment of a proper compensation, and the ground on which this relief is given is, that the penalty of forfeiture is usually inserted in the lease only to secure payment of the rent, and that if the rent be paid, and compensation made for any delay that has taken place in paying it, no injury will be done to the landlord; whereas, if the penalty be enforced, the tenant will suffer an injury wholly disproportionate to the harm done to the landlord. But equity never relieves against forfeitures caused by breaches of other conditions in leases (except on the grounds of fraud, accident, or mistake), because the damage caused by such breaches is not easily ascertained, and compensation is out of the question." Smith's Equity, 330-332. It may be urged that this equitable doctrine is not applicable to this country, for here a *talukdar's* omission to pay his rent on the fixed date may cause the landlord's estate to be sold for arrears of revenue, the damage arising from which cannot be always estimated in money. It may be doubted whether the decision of July, 1860, was not sounder than those of recent date, since Clause 5, Section 23, distinguishes ejectment for non-payment of rent under the law—Sections 21-22,—from ejectment on account of breach of special contract; and the context would seem to indicate that Section 78 only applies to the former.

indulgence of Section 78, while the plaintiff contended that he had brought his suit under Clause 5, Section 23, on account of breach of the special conditions of the lease, whereby the same was liable to be cancelled, and that he was entitled to insist on absolute cancelment. The Court remarked that the words "on account of the breach of the conditions of any contract" do not occur in Section 78 at all, yet they still were of opinion that they were bound to treat Section 78 as if it applied to such cases as the one before them. They said: "We are by no means inclined to lay down a general rule, or to say that, in all cases of suits for cancelment, the latter part of Section 78 is to operate invariably in the defendant's favour as a bar to forfeiture, provided he pays in the amount of the arrears within fifteen days of the date of the decree. It is quite possible to conceive a number of cases in which the application of such a doctrine would be productive of the greatest injustice. In cases where a tenant had covenanted to plant trees or to keep up plantations or embankments, or to drain, or to dig reservoirs, it would be unjust to allow a tenant, who had wilfully broken such essential stipulations, to bar forfeiture merely by paying in the amount of the arrears decreed against him. But the present case involves and supposes none of these contingencies (*a*)." When a farmer sued his under-farmers for rent, and obtained a decree, and on his proceeding to execute it, the under-farmers, in consideration of execution being stayed, entered into an *ikrar*, to the effect that on breach of certain conditions the lease should be cancelled, and a breach of these conditions afterwards took place, it was held that a decree for absolute cancelment should be given, and that it was wrong to allow the tenants the indulgence of Section 78 (*b*). A decree for cancelment of a lease, on account of the breach of the conditions of any contract, is not precluded by the circumstance that the execution of a

(*a*) *Mihr Chand Sahu*, H. C., 10th May, 1867.

(*b*) *Ram Kumar Bhuttacharyya*, H. C., 6th February, 1867.

decree for arrears of rent and cancelment of the lease, on the ground of non-payment of arrears of rent, has been stayed under Section 78 (*a*). Suits to cancel *zar-i-peshgi* leases, on the ground of breach of conditions, will not lie in the Collectorate (*b*).

Fixtures.—It is a maxim of English law, that whatever is once annexed to the free-hold, becomes part and parcel thereof, and belongs to the landlord. Thus, if a tenant builds a house upon the land, he cannot pull it down again without committing waste; and, generally, whenever anything is once firmly and permanently annexed to the inheritance, even by the tenant himself, he cannot remove it again, unless by virtue of express stipulation with his landlord. But it is now settled that a tenant may take away fixtures put up for the ornament of the premises, or the convenience of the tenant's trade or occupation, if they can be dis-annexed without any permanent injury to the inheritance (*c*). Mr. Seton-Karr, in his Minute, dated 2nd June, 1864, observes, that the law that fixtures become the property of the landlord is unknown in this country, even in theory, and that it is always customary in Bengal to allow *ryots* to carry away their bamboo houses when they resign their *jotes*. This difference of the law in the two countries is owing to the more limited and restricted character of the Bengal *zamindar's* "property in the land," as compared with that enjoyed by free-holders in England.

(*a*) *Hafiz Mushtak Ahmad*, N. W. P., 28th March, 1866.

(*b*) *Ratan Singh*, H. C., 8th August, 1867.

(*c*) Smith, 263, 264.

CHAPTER VI.

CHANGE OF PARTIES DURING TENANCY.

The points to be considered in this chapter are those which occur on a change of the original parties to the tenancy, either by the introduction of a new landlord, or of a new tenant, during the tenancy, and they will be discussed under the following heads:—

(1). In what cases the parties may assign.
(2). By what means assignment may be effected.
(3) The formalities necessary on assignment.
(4). The consequences of assignment.

I.—In What Cases the Parties may Assign.

As to landlords, they can, of course, always assign their estates or *taluks*, unless precluded from doing so by the conditions of their tenures, or by express agreements with the tenant, such as sometimes occur in mortgage tenancies.

As to tenants assigning, this depends on the nature of their tenures or leases. There are a great number of cases on the subject which are not always consistent with one another.

As to middlemen tenants, there are certain *taluks*, such as *jungleburi* and *putnee* tenures, which are declared by law to be transferable, whether by inheritance, sale, or gift (*a*). *Istimrari mukarrari taluks* also are heritable and transferable by their conditions (*b*), and for this reason, when default is made in the

(*a*) Section 8, Regulation VIII, 1793; Clause 1, Section 3, Regulation VIII, 1819.

(*b*) S. D., 1847, 192; 1853, 418, 1858, 652, 920, S. D., 31st December, 1860, 1861, 382, 26th March, 1862.

payment of the rent, they are sold, and not cancelled. The tenure called *Birt ijara* has likewise been construed to be a heritable tenure (*a*). But the *sarbarahkari* or *mukaddami* tenures of Cuttack are not transferable to the same extent as ordinary *istimrari taluks* (*b*); and for this reason they are held to be liable to cancelment, and not to sale, upon the occurrence of an arrear (*c*). Generally speaking, the *mukarrari* tenures of Behar are not considered to be heritable unless the *pottah* contains "words of inheritance." But in some old cases they appear to have been presumed to be heritable, even in the absence of such expressions (*d*). *Istimrari taluks* resulting from resumed *lakhiraj* tenures under Section 9, Regulation XIX, 1793, are expressly declared to be heritable by Section 8 of that Regulation.

As to *taluks* not held at a fixed rent, there appears to be no general rule. A *taluk* which is not *mukarrari* may be heritable and transferable (*e*), but the question, whether any particular *taluk* of this class is transferable without the consent of the landlord, can only be settled by enquiry into the local custom of the district, as there is no general law or custom applicable throughout the country (*f*). When Government, as *zamindar* of a *khas mehal*, had once sold a *shikmi taluk* for arrears, and thus recognised its transferable character, a subsequent *zamindar* could not repudiate it (*g*). So, when the *zamindars* by their acts had admitted a *taluk* to be transferable, it was held that this was conclusive evidence of its transferable character (*h*).

(*a*) I. S. R., 176.

(*b*) R. B., 57, 12th December, 1836.

(*c*) S. D., July, 1860, 109.

(*d*) III, S. R., 332.

(*e*) *Sukimani Haldar*, H. C., 25th July, 1864; *Haru Mohan Mukherjya*, 4th August, 1864.

(*f*) *Jaikissen Mukherjya*, H. C., 21st September, 1864.

(*g*) *Goluk Chunder Sen*, H. C., 28th January, 1863.

(*h*) *Dhanpat Singh*, H. C., 5th May, 1864.

There is, it has been said, no analogy between the case of a hereditary tenure and that of a farm and hence, generally speaking, when a farmer is not empowered by the terms of his lease, or by the consent of his landlord, to transfer the farm, a transfer is invalid (*a*). But when the law itself casts the right to a farm upon the acquirer, independently of any act or interference of his own or of any other person for that purpose, it seems that the title of such acquirer must be respected. Thus, if a farmer dies before the expiration of his lease, the remainder of the term devolves upon his heir, and the landlord is bound to respect the heir's title (*b*). In one old case it was held that a lease granted to a man for the term of his life might be assigned without consent of the lessor (*c*). A lease conveying an "interest absolute," *i. e.*, in perpetuity, is generally transferable without the landlord's consent. Thus the tenancy called "*maurusi ijara*," which conveys a right of occupancy in perpetuity at *pergunnah* rates, is transferable without the *zamindar's* consent (*d*).

Regarding transfer of *ryotti* tenancies, the rulings have been very contradictory. In the deposition of the *Rae Raiyan* (*e*), it is said, "a *ryot* being a tenant, and holding under a *pottah* and possessing no authority to give or sell, has no property in the soil." Lord W. Bentinck says of the *Thani ryots* of Cuttack :—"They were so heavily taxed, that their tenures were without exchangeable value, and sales were unknown." Construction 890 declared *jotedari* interests to be saleable in execution of decrees. But as the question, in answer to which

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(*a*) S. D., 1859, 514. But in one case the Western Court observed, "the covenant between landlord and tenant should not be construed as prohibiting the assignment of a farm." *Sadut Ali*, N W. P., 15th February, 1866; and see a *dictum* in *Taramani Dassya*, II. C., 8th September, 1864.

(*b*) S. D , 1859, 138; *Tej Chand Bahadur*, Sutherland P. C., 152; Moore, III, 261

(*c*) V. S. R., 205

(*d*) *Dyaram*, I. S. R., 146.

(*e*) III, Harrington, 354.

that Construction was given, was, "whether, if the *zamindar* did not object, a *jotedari* interest might be sold," it was often said that this ruling went upon the supposition that the *zamindar* did not object to the sale (*a*). In one case it was said that when *ryotti* holdings have been habitually sold under former land-holders, the right of transfer must be conceded by the successors of such land-holders (*b*). In some cases it was laid down broadly that the consent of the *zamindar* was not necessary to render the sale of a *ryotti* interest valid (*c*). In other cases it was said that such consent was necessary (*d*). And it was sometimes said that there was no general rule of universal application, as the matter depends upon the particular usage of each district (*e*). So, too, in a recent case, it was said: "what tenures are transferable in a particular district, and whether a tenure is in a particular district transferable without the consent of the landlord, can only be settled by enquiry into the local custom of the district. There is no general law or custom applicable throughout the country" (*f*). *Mukarrari* tenancies, *i.e.*, those of which the rent is fixed for ever, are generally transferable without the consent of the landlord, unless there be any special condition in the lease to the contrary. And there are various descriptions of tenancies other than "*mukarraris*," that can be sold, and are sold every day; the *hawalas* and *nim hawalas* of Backergunge, and the *jotes* of Rungpore, for example (*g*). Rights of occupancy established by the ancient custom and prescription of the country, such as *nim hawalas*,

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(*a*) S. D., 1859, 1456, 1356.

(*b*) *Abdulla*, VII, S. R., 311.

(*c*) *Radha Madhub Ghose*, S. D., 1853, 418; see S. D., 1857, 1483; Constr. 702.

(*d*) S. D., 1853, 536; 1855, 14.

(*e*) See III, S. R., 311; Constr. 1205; IX, N. W. P., 155; Clause 7, Section 15, Regulation VII, 1799, Section 9, Regulation VII, 1822.

(*f*) *Jay Kishen Mukharjya*, H. C., 21st September, 1864.

(*g*) *Hara Mohan Mukharjya*, H. C., 4th August, 1864.

are transferable, though they do not carry a right to hold at fixed rates (*a*). In another case, a Rungpore *jote*, held at a variable rent, was declared to be transferable without the *zamindar's* consent (*b*).

As to rights of occupancy under Section 6, Act X, there have been decisions, both by the Calcutta and the Agra Court, to the effect that they are transferable (*c*). The former Court observed, "a right of occupancy is, after all, a perpetual lease, the holder of which cannot be ejected so long as he pays a fair and equitable rent. There are many similar rights common in different parts of Bengal, such as the *jotes* of Rungpore and the *hawalas* of Backergunge, which are, in effect, in no respect higher than that of a right of occupancy, inasmuch as they are mere personal rights which are, and have always been, held to be transferable as well as heritable, and we see no reason why these latter rights should not fall within the same category. An ordinary terminable lease, moreover, can be transferred, [?] and why not a right of occupancy which is not terminable except on the *laches* of the holder?" But, in a later case, it was said that the question, whether a "right of occupancy" is transferable, depends on local custom (*d*). And it has since been decided by a Full Bench that "rights of occupancy" under Section 6, are not transferable without the landlord's consent, and that it is even doubtful whether they are heritable (*e*). The

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(*a*) *Jagat Chandra Rai*, H. C., 15th September, 1864.

(*b*) *Digambari Debya*, H. C., 10th June, 1864.

(*c*) *Taramani Dasya*, H. C, 8th September, 1864; *Maheshur Buksh Singh*, N. W. P., 22nd March, 1862.

(*d*) *Sri Ram Bose*, H C., 10th May, 1865. They are saleable by the custom of most districts. See Mr. Seton-Karr's minute, dated 2nd June, 1864, para 15.

(*e*) There do not appear to be very good grounds for this doubt. Section 6 provides, that "the holding of the father, or other person from whom a *ryot* inherits, shall be deemed to be the holding of the *ryot*," and thus, by the express provision of the Section creating the tenure, the rights of a deceased tenant descend to his heir.

accrual of a right of occupancy certainly does not make a tenancy transferable which is otherwise not transferable (*a*). The Western Court has held, that when a landlord has once admitted a right of occupancy to be transferable, he is estopped from denying it for all time to come (*b*). When the *zamindars* had, by their acts, admitted a tenure to be transferable, the Calcutta Court ruled that it could not be declared non-transferable by a Revenue Court in a suit for rent (*c*). When the former landlord had recognised the transferable character of a tenure by selling it for arrears, his successor was held to be bound by this admission (*d*). The proper tribunal to settle a contested question, as to the transferable character of a tenure, is the Civil Court (*e*).

Contract tenancies are, generally speaking, not transferable without the landlord's consent. When such a tenancy was sold without the landlord's consent, the Western Court cancelled the sale and reinstated the vendor (*f*). A *ryot*, not possessed of a transferable tenure, quitting possession and transferring his rights, is in no higher position than a tenant at will whose tenancy is determined by his quitting the land (*g*). Farmers may sanction transfers. Unless the authority of a farmer is restricted by contract or by the custom of the country, he is authorized in good faith to sanction the transfer of a portion of a holding, and the *zamindar* cannot subsequently refuse to acknowledge the transaction (*h*). The transfer of a holding in a Government estate is valid if registered by the farmer, and passively

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(*a*) *Ajuddhya Prasad*, H. C., 31st May, 1867, F. B.

(*b*) *Maheshur Buksh Singh*, N. W. P., 26th August, 1864.

(*c*) *Dhanpat Singh*, H. C., 5th May, 1864.

(*d*) *Goluk Chunder Sen*, H. C., 28th January, 1865.

(*e*) *Dhanpat Singh*, H. C., 5th May, 1864; *Maheshur Buksh Singh*, N. W. P., 26th August, 1864.

(*f*) *Syad Chiragh Ali*, N. W. P., 14th March, 1863.

(*g*) *Hari Har Mukharjya*, H. C., 1st February, 1867.

(*h*) *Hara Mohan Mukharjya*, H. C., 20th January, 1865.

sanctioned by the Government, the Collector making a mutation of names (*a*). In one case in which the lease contained a condition against assignment, the tenant was allowed to assign on proving that his tenure was transferable by the usage of the district (*b*). As in the case of tenancies of middlemen, so in that of *ryotti* tenancies, it is a general rule that *zamindars* are not bound to recognise sub-divisions of the rent of holdings. When a portion of a *jote* is transferred without licence, the transferree cannot establish his separate liability; but (if liable at all) he is jointly liable for the whole rent (*c*). The law does not require a *zamindar* to accept and register any sub-division of a tenure previously registered as undivided. The policy of the law is, that an undivided tenure gives the landlord more security for his rents than one split up into small portions (*d*).

II.—In what Ways Assignment may be Made.

Change of parties to a tenancy may be effected in two ways: 1st, by act of the parties themselves, *e.g.*, by a private sale or gift; 2nd, by act of the law, *e.g.*, by inheritance, by sale for arrears, or in execution of decree, &c.

III.—Formalities on Assignment.

Assignment by landlords.—In the case of assignments or transfers of landlords' rights and interests, the old rule was that the tenant must "attorn" to the assignees, (*i.e.*, recognise the assignee's title as landlord,) before the assignee could hold him liable for the rent; for, as observed by Mr. Smith, it was considered unreasonable that the tenant should be placed in a situation of responsibility and obligation to a person of whose very existence he might be ignorant, since the assignment might be executed behind his back, and altogether without his knowledge (*e*). But when an estate was in the occupation of a

(*a*) *Hara Mohan Mukherjya*, 22nd December, 1864.
(*b*) S. D., 1856, 297 (?)
(*c*) *Sukhan Sahai*, H C, 7th June, 1864.
(*d*) *R. Watson*, H. C., 21st August, 1865.
(*e*) Smith, 280.

great many tenants, it was found troublesome to procure attornments from all of them, and therefore, by a Statute of Queen Anne, attornment was abolished, and notice to the tenants was substituted. There is no express provision in the Regulations requiring landlords to give notice to their tenants when they assign their estates (*a*); but it has always been the practice of the Courts to require such notice, and it is a settled rule that notice to the tenants is always necessary in order to enable the assignee to collect rent from the tenants (*b*). In one case it was said, "until the tenant has a clear and distinct notice, either actual or symbolical, (which last is usually given in this country by placing a bamboo in the ground,) the transfer of the proprietary right cannot be said to bind the tenant (*c*). An *amulnama* is equivalent to a notice; and the tenant, on production by the assignee of such *amulnama*, together with the deed of transfer and his own *kabulyat*, is bound to pay rent to the assignee (*d*). If the tenants, after due notice of transfer, continue to pay rent to the assignor, they do so at their own peril, and cannot plead such payment in answer to the new owner's suit for rent, and even when the payment had been made under order of Court it was not recognised (*e*). When the assignment is made by operation of law, the notice is usually given by the Court. Thus, when an estate is sold for arrears of revenue, a notice is issued to the *ryots* by the Collector, "forbidding them to pay the defaulting proprietor any rent which has fallen due after the day fixed for the last day of payment, on pain of not being entitled to credit in their account with the purchaser for any sums so paid" (*f*). And after the purchase-money is

(*a*) Section 53, Regulation VIII, 1793, however, requires *zamindars* leasing their estates to farmers, or entrusting them to agents, to grant *amalnamas* to such farmers or agents.

(*b*) See S. D., August, 1860, 125; December, 1861, 187.

(*c*) *Thakur Dass Gossain*, S. D., 1859, 822.

(*d*) S. D., 1845, 194.

(*e*) *Collector of Rajshahye*, H. C., 26th January, 1864.

(*f*) Section 5, Act XI, 1859.

paid, "proclamation is made to the *ryots* by beat of drum, or in such other mode as may be customary" (*a*). When sale takes place in execution of a decree, the Court issues a written order prohibiting the tenant from paying rent to the defaulter, which order is read aloud at some place on the land, and fixed up in the Court-house and in the Collector's office (*b*). And a copy of the sale certificate is fixed up in some conspicuous place on the land, and proclamation is made to the occupants by beat of drum, or in such other mode as may be customary, that the right, title, and interest of the judgment-debtor has been transferred to the purchaser (*c*). When under-tenures are sold under Act VIII, 1865, B.C., on the application of the purchaser, an Ameen is deputed to put him in possession, and to publish the fact of the purchase to the *ryots* (*d*). If an auction-purchaser omits to give notice of his title to the tenant, and the tenants, misled by the want of such information, continue to pay their rents to the old proprietor, the auction-purchaser must bear the consequences of his neglect (*e*). By Section 15, Regulation VIII, 1819, purchasers of *putnee* tenures, after having registered their names in the *zamindar's* office and furnished security, are entitled to receive "the usual *amuldastak* or order for possession, together with the notice to the *ryots* and others to attend and pay their rents thenceforward to them." When a *durputneedar* obtains possession of the parent *putnee* tenure by paying up the arrear due from it, under Section 13, Regulation VIII, 1819, it has been ruled that, like other assignees, he must give notice to the tenants of the transfer of possession before he can hold the tenants liable for the rents. In one case in which this had not been done, the Court said. "We think it

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(*a*) Section 24, Act XI, 1859.

(*b*) Section 239, Act VIII, 1859.

(*c*) Section 264, Act VIII, 1859.

(*d*) Section 11, Act VIII, 1865, B.C.

(*e*) *Collector of Rajshahye*, II. C., 26th January, 1864.

clear that, although the plaintiff, after having been put in possession of the tenure, was entitled to the profits of it, it was his business to see that effectual notice was given to the *ryots*, and if, in consequence of any neglect on his part, or on that of the *Nazir* of the Court, they remained in ignorance of his title, they cannot be compelled to pay over again rents paid by them to the *putneedar*" (*a*). When a landlord creates an intermediate tenancy between himself and a former tenant, the former tenant cannot be sued for rent by the intermediate tenant till he has received due notice (*b*). If a tenant has been in the habit of paying to two shareholders jointly, payment to one of them is a sufficient defence in a suit for rent, unless the tenant has received notice of separation (*c*). When an estate is transferred by inheritance, and there are disputes among the heirs, the tenants, it is said, may always protect themselves from the chance of paying rent to the wrong party by requiring a certificate under Act XX, 1841 (now Act XXVII, 1860) before making any payment (*d*). The certificate is thus the substitute for the ordinary notice. But, in a recent Full Bench decision, it is said that a devisee under a will can sue for the rent of property devised to him without obtaining a certificate, as the certificate is only necessary to enable him to collect rents which accrued in the testator's lifetime, and were due to the testator (*e*).

Assignment by middlemen tenants.—When assignment is made by a *talukdar*, the rule is as follows:—"All dependent *talukdars* and other persons possessing a permanent transferable interest in land intermediate between the *zamindar* and the cultivators, are required to register, in the *sherista* of the *zamindar* or superior tenant to whom the rents of their *taluks* or tenures

(*a*) *Nilmani Rai*, H. C., 5th December, 1865.

(*b*) *Attapai Moula*, H C., 21st August, 1862. See *Mohan Chunder Dutt*, H. C., 31st July, 1866, as to the right to create such tenures.

(*c*) *Akbarunissa*, H. C, 11th August, 1864.

(*d*) S. D., 1851, 488; 1853, 898.

(*e*) *Beni Madhub Ghose*, H. C., 11th September, 1866, F. B.

are payable, all transfers of such *taluks* or tenures, or portions of them, by sale, gift, or otherwise, as well as all successions thereto, and divisions among heirs in cases of inheritance. And every *zamindar* or superior tenant is required to admit to registry, and otherwise give effect to all such transfers when made in good faith, and all such successions and divisions. If any *zamindar* or superior tenant refuse to admit to registry, or otherwise give effect to any such transfer or succession, the transferree or successor may make application to the Collector, and the Collector shall thereupon proceed to enquire into the case in the manner provided for suits under Act X, and, if no sufficient grounds are shown for the refusal, shall pass an order enjoining the *zamindar* or superior tenant to admit to registry, and otherwise give effect to such transfer or succession. Provided that no *zamindar* or superior tenant shall be required to admit to registry, or give effect to any division or distribution of the rent payable on account of any such tenure, nor shall any such division or distribution of the rent be valid and binding without the consent, in writing, of the *zamindar* or superior tenant" (*a*). Where the evidence went to show that an old established tenure was in its inception a *ryotti* tenure, though on one occasion the tenant had sub-let his lands in *putnee*, it was held that a transfer need not be registered under Section 27 (*b*).

The effect of registering a transfer of a tenure is (to use the words of Section 5, Regulation VIII, 1819) "to discharge the party transferring his interest from personal responsibility, and to accept the engagements of the transferee." On the other hand, the effect of omitting to register the transfer of a tenure is that the transfer will not be recognised, unless sufficient cause for non-registration be shown to the satisfaction of the Collector (*c*). The proprietor of a tenure, whose name is registered

(*a*) Section 27, Act X, 1859.

(*b*) *Karu Lall Thakur*, H. C., 4th January, 1867.

(*c*) Section 106, Act X, 1859.

in the *zamindar's* office, is liable for the rent, and the *zamindar* is not obliged to recognise any unregistered assignee (*a*). A *putneedar* need not recognise a private purchaser as *durputneedar* till he registers his name, and any proceeding held against the vendor for the recovery of arrears of rent, without making the purchaser a party, is perfectly legal (*b*); and the *putneedar* need not accept payments made by the purchaser (*c*). The tenure itself may be sold on a decree being obtained against the registered tenant, for the tenure itself is what the landlord has to look to for the realization of his rent (*d*). In one case it was said: "We cannot accept the doctrine that the superior *talukdar* is bound to seek out other parties of whose existence or claims he may be wholly ignorant. He is fully justified in dealing with the parties whom he finds in possession, and whom he may reasonably deem the sole parties really liable"(*e*). A *mukarrari* tenant cannot, by an unregistered transfer, avoid his present responsibility to his landlord for his rent (*f*). When a *zamindar* sued certain tenants for rent according to a *kabulyat*, and a *jamabundi* made when the estate belonged to Government, and an intervenor claimed to have purchased a portion of the tenure and to pay the rent, the Court said: "If a legal transfer of the rights of the original tenant has taken place, the plaintiff is entitled to know what the nature of that transfer is, and as no transfer has ever been recognised, the original tenants are still liable" (*g*). But in recent cases the stringency of the rule has been somewhat relaxed. When a suit for old arrears was brought against the vendor of a transferable tenure, who had transferred it to another tenant without registering the

(*a*) *Mohan Mala*, S. D., 27th March, 1862.

(*b*) *Bissomayi Dassya*, H. C., 9th January, 1863; VII, S. R., 481.

(*c*) *Lucki Narain Mitter*, H. C., 20th June, 1866.

(*d*) S. D., 1859, 473, 707.

(*e*) *Tiluk Chunder Chuckerbutty*, H. C., 31st March, 1863.

(*f*) S. D., 1850, 12.

(*g*) *Hara Mohan Mukherjya*, H. C., 26th November, 1864.

transfer, the unregistered assignee was allowed to defend the suit on the ground that he had been in possession for a considerable time (*a*). So, too, when the assignee had succeeded in establishing his title in a suit against the landlord, it was held that the landlord could not refuse to recognise him on the ground of non-registration (*b*). And when the *zamindar* had received rent from an unregistered transferee for 22 years, the Court held that he had recognised the transferee by so doing, and could not hold the registered tenant liable (*c*). Mere cognizance, however, by the *zamindar* of the fact of a transfer is not sufficient to cure the defect of non-registration. In one case the Court observed: "The current of decisions on this point has uniformly been that a *zamindar* is not bound to recognise any transfer in regard to which application has not been made to have such transfer registered in the *zamindari sherista*, unless it can be proved that the *zamindar* has not only known of the transfer, but has also accepted the transferee as his tenant; and the receipt of rent by the *zamindar* after such transfer has been held one of the best proofs of the fact of a *zamindar* having so accepted the transferee:" mere cognizance of the transfer is not sufficient (*d*) When a *shikmi talukdar* sued his landlord for possession, and, pending the suit, sold eight annas of his tenure, and the suit was decreed, and after the decree the *talukdar*, colluding with the *zamindar*, took a fresh lease of the entire *taluk*, with the object of defrauding the purchaser of his eight-anna share, and thereupon the purchaser sued in the Civil Court to set aside the new lease, and the *zamindar* pleaded that, as the purchaser had not registered his name in his *sherista*, he was not bound to recognise him; the Court said, "this is too hard a proposition; the *zamindar* need not proceed against the purchaser for rent (the tenure being liable in the first instance)

(*a*) *Shiva Narain Bhuttacharyya*, S D., 5th September, 1861.
(*b*) *Kailas Chunder Ghose*, H. C., 19th August, 1862.
(*c*) *Nara Kumar Ghose*, H C., 15th July, 1864.
(*d*) J C Sarkies H. C., 1st July, 1864

until he be registered, but after a person has purchased, with the knowledge of the *zamindar*, a share in a tenure transferable by sale, the *zamindar* is bound to act, as regards that person, in good faith"(*a*). When the transferee of a transferable tenure has neglected to register his name in the *zamindari sheristá*, the latter can sell the tenure for arrears, but he cannot, under all circumstances, treat the transfer as a nullity. Even if the tenure be put up to sale, the transferee can deposit the rent and prevent a sale (*b*). The rule regarding registration of transfers is not always strictly enforced in cases of transfers in execution of decrees. When a *putnee taluk* was sold in execution of a decree against the *putneedar*, and the *zamindar*, ignoring the transfer, sued the original *putneedar* for rent which had accrued after the sale, it was held that the original *putneedar* was not liable, though the transfer had not been registered (*c*).

As to the procedure for enforcing registration, Mr. Field observes: "The law does not contain any provision for enforcing the registry, if the *zamindar*, who has been enjoined, refuses or neglects to notice the injunction. As in the case of a *pottah* and *kabuliyat*, there is no provision that a copy of the Collector's order shall have the same force as registry; but, doubtless, in practice, such force would be given to it" (*d*). Appeals from orders passed under this Section lie ordinarily to the Commissioner (*e*). But the High Court has held that, when a landlord declines to recognise a transferee of a tenure as a tenant, or refuses to receive rent from him, there is no relationship of landlord and tenant between the parties; and, consequently, a suit by the landlord to eject the transferee lies in the Civil

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(*a*) *Mohesh Chunder Samadar*, H C., 26th August, 1866.

(*b*) *Nobin Kishen Mukherjya*, H. C., 29th January, 1868.

(*c*) *Ram Kamul Mistri*, H. C., 9th December, 1862.

(*d*) Rent Law Procedure, p. 100.

(*e*) *Mir Muhammad Takr*, S D., 17th June, 1861, *Fakir Koiri*, N. W. P., 25th November, 1862, F B.

Court, and not in the Collectorate (*a*). And on the authority of the marginal note, this ruling is often quoted as an authority for the position that, when the landlord refuses to admit a transfer, the appeal from an order for registry, under Section 27, lies to the Civil Court. But this appears to be carrying the ruling further than was intended, for it is obvious that refusal by the landlord to admit to registry, or, in other words, a repudiation by him of the relationship of landlord and tenant, is the cause of action in all suits, under Section 27; and, consequently, if the principle of the ruling quoted does apply to these suits, they must all be instituted in the Civil Court, and Section 27 would become a dead letter. The Western Court has held that, as suits for registry are not among the descriptions of suits of which the primary cognizance is vested *exclusively* in the Revenue Courts, the Collector and the Civil Court have concurrent jurisdiction. And the denial of the right to purchase a tenant-right, conceived to be of a transferable nature, gives the claimant a right of action in either Court (*b*).

Assignment by putneedars.—As to *putnee* tenures, Section 5, Regulation VIII, 1819, provides that, on the occasion of a *private* transfer of a *putnee taluk*, the *zamindar* shall be entitled to charge a fee of two per cent. on the annual rent of the interest transferred, until the same shall amount to 100 Rupees, which sum shall be the maximum fee. The *zamindar* shall also be entitled to demand substantial security, to the amount of half the yearly rent payable to him, from the tenure transferred. On the occasion of a transfer by a sale for arrears, security may be demanded, but no fee. The *zamindar* cannot be compelled to register transfers of fractional portions of a *putnee taluk*, "for no apportionment of the *zamindar's* reserved rent can be allowed to stand good, unless made under his special sanction." By Section 6, the *zamindar* may refuse to register the purchaser's

(*a*) *Tara Mani Dasya*, H. C., 8th September, 1864.

(*b*) *Muhessur Buksh Singh*, N. W. P., 26th September, 1864.

name till the fee and the security be tendered. And if there be a dispute regarding the security, the Civil Court, upon petition, may enquire into the matter, and enjoin the *zamindar* to accept it. In the case of private transfers, this enquiry may be still conducted by the Civil Court (*a*). But when the transfer is effected by a public sale, under Regulation VIII, 1819, this enquiry is to be conducted by the Collector (*b*). It has been held, that the acceptance by the Collector of security tendered by a purchaser of a *putnee* at a sale, under Regulation VIII, 1819, is sufficient to entitle the purchaser to be placed in possession. *Hazir zamini* and a *kabuliyat* cannot be required in addition (*c*). By Section 7, Regulation VIII, 1819, when the transfer takes place in execution of a decree, or in consequence of a sale for arrears of the *putnee* rent, if the purchaser omits to furnish security within the period of one month from the date of the sale, the *zamindar* may hold the *taluk* in attachment till the security is given. The attachment is to be regarded as a trust for the benefit, and at the risk, of the purchaser; surplus collections will be paid to him, and any deficit may be recovered from him as an arrear of rent. The *zamindar's* accounts shall be received as *primâ facie* evidence to warrant process for an arrear so accruing. It has been held that, before a *zamindar* can hold a purchaser of a *putnee taluk* liable for the rent, it must be shown that he has given him possession, as far as lies in his power (*d*). But when, in a suit against a purchaser for rent, it appeared that the purchaser had failed to get possession, but that this was owing not to the fault of the *zamindar*, but to the opposition of a

(*a*) S. D., 1859, 1,216. It would seem that such application might also be heard by the Collector, under Section 27, Act X.

(*b*) Section 3, Act VIII, 1865, B. C.

(*c*) S. D., 1855, 103.

(*d*) S. D., 1858, 1,096. See Section 5, Regulation VIII, 1819. See *T. Smith*, H. C., 2nd December, 1864.

stranger, a decree for the rent was given (*a*). This ruling is in accordance with the general rule regarding the landlord's guarantee for quiet possession, as laid down in the cases quoted in Chapter IV.

Assignment by farmers.—The rules as to registration are not applicable to farms of a non-transferable nature (*b*). The substitute for registration in these cases is license by the *zamindar* to assign (*c*). When a lessee of indigo lands transferred his lease without license, he was held still liable for the rent which became due after transfer, but he was allowed to sue the assignee for the amount (*d*). When a lease, containing an express condition against assignment, was once assigned by special license from the *zamindar*, and again without such license, the effect of the want of assent on the part of the lessor to the last transfer was to maintain unimpaired the liability of the last licensed acquirer (*e*).

Assignment by ryots.—It has been held that Section 27 does not apply to *ryots*, as they do not possess an *intermediate* transferable right between the *zamindar* and the cultivator; and, consequently, that purchasers of *ryotti* tenancies (though they often do register) are not compelled to register their purchases in the landlord's registers (*f*). If the holding be not transferable, the *zamindar's* license is necessary before it can be assigned. If the transfer of a non-transferable tenure has not been licensed, or recognised by the *zamindar*, the *zamindar* is entitled to treat the purchaser as a trespasser and evict him, even in the middle of the year. But where a tenure is transferable, the mere absence of registration, or any acknowledgment of the transferee's

(*a*) S. D., 1858, 1,565; 1857, 1,434, 1,473.

(*b*) S. D., 1859, 1,051.

(*c*) VII, S. R., 163.

(*d*) *Motee*, VI, S. R., 67.

(*e*) *Gordon, Stuart & Co.*, H. C., 10th July, 1862

(*f*) *Sutish Chunder Rai*, H. C., 27th June, 1864, *Taramani Dasya*, H. C, 8th September, 1864.

right by the *zamindar*, would not justify the *zamindar* in evicting him in the middle of the year (*a*). In a later case it was said: "When a tenant who holds a tenure not transferable without the consent of the *zamindar*, transfers the tenure without such necessary consent, such transfer is incomplete and a nullity, for one of the elements required to make it complete, and without which the title is defective, is wanting as against the *zamindar*, therefore the purchaser can have no right. He cannot require the *zamindar* to take rent from him, nor, if the *zamindar* have a right of entry, can he resist him in the exercise of that right." "But, as between the *zamindar* and the tenant, what is the effect of such conduct on the part of the tenant? Does the act of the tenant cause a forfeiture of the tenure, and give the *zamindar* a right of entry? The *zamindar* is not bound to recognize the transfer, nor to look for his rent to the transferee; and if the tenant fail to pay the rent, he may exercise his rights as landlord, whatever they be; but so long as the recorded tenant, or his heirs, continue to pay rent, we think that the *zamindar* cannot evict such tenant, and himself take actual possession of the tenure. If the (recorded) tenant abscond or die without heirs, the previous transfer by him of the tenure to a third party would be no obstacle to the *zamindar* entering upon possession, but such transfer, being incomplete and illegal, would not prejudice the *zamindar's* right to do with the land as he is entitled to do by law; but as long as the tenant is present, and pays his rent regularly, the landlord cannot, we think, enter into actual possession. If the terms of the lease do not provide for the forfeiture of the tenure, should the tenant make an unauthorized transfer, and the tenant himself continues to pay the rent, the landlord cannot take possession. What is above stated does not, we think, differ from the ruling of the late Sudder Court, quoted by the Judge. That decision ruled, that the landlord was not bound to recog-

(*a*) *Hara Mohan Mukharjya*, 17th January, 1865.

nize or to receive rent from parties to whom tenants, not having a right to transfer, had sold their lands" (*a*). In another case, in which the *zamindar* sued the recorded tenant of (apparently) a transferable tenure for rent, and the tenant pleaded that he had transferred his *jote*, the Court said: "We do not think the decision of the Judge is quite clear. He seems to consider that the old tenant, and the old tenant only, must remain liable till the transfer has been formally registered under Section 27, Act X. The tenure does not appear to be an intermediate holding within the meaning of the Section, but a mere *ryot's jote*. In respect to such a *jote*, we think (as laid down in a former ruling) that the person liable is the party in possession. It appears to be admitted that the plaintiff did actually receive rent from Rajkissen (the transferee), though he gave the receipt in the form "Gungaram through Rajkissen." We think, therefore, that the Court must find whether Rajkissen really was the party in possession during the period sued for. If so, then he, and not Gungaram, will be liable for the rent" (*b*). In another case a transferee of a transferable tenure, who had omitted to register the transfer, was declared even to have the right to be restored to possession as against the *zamindar* who had evicted him (*c*). Section 17, Act VIII, 1865, B. C., provides that the purchaser of an under-tenure sold under that Act, shall, within fifteen days from the day of sale, apply to the landlord to have his name registered in the landlord's books as the purchaser, and shall execute a *kabuliyat* on the same terms as those on which the under-tenure was held by

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(*a*) *Joy Kissen Mukharjya*, H. C., 12th March, 1866. *Per* Kemp and Glover, J.J. See *Sheikh Bakar Ali*, H. C., 13th March, 1866.

(*b*) *Gungaram Sirdar*, H. C., 31st July, 1866. *Per* Trevor and Campbell, J J. It appears to be still a moot point whether such a purchaser can intervene in a suit brought against the recorded tenant. See *Hara Mohan Mukharjya*, H. C., 6th August, 1864, and cases quoted under head of "I, Interveners," under Section 77, Chapter IX.

(*c*) *Nobin Kisto Mukharjya*, H. C., 25th June, 1867.

the defaulter; and that, if such application be not made, it shall be lawful for the *zamindar* to sue for a *kabuliyat*.

It may be as well to mention that all deeds assigning an interest of the value of Rupees 100 and upwards, in any immoveable property, are required to be registered by Section 17, Act XX, 1866. And Section 13, Act XVI, 1864 (which came into force on 1st January, 1865), contained a similar provision.

And Clause 2, Section 11, Regulation III, 1828, provides that "all persons succeeding to the possession of any lands held on a *mukarrari jama* on the decease of a former occupant, or by gift, purchase, or other assignment or transfer of the proprietary right, are required immediately to notify the same to the Collector of the District, and any omission to notify such succession or transfer for a period of six months or more shall subject such land to immediate attachment by the revenue officer." But this penalty is never enforced, and it has been held that, as it relates merely to the security of the revenue, a breach of it cannot be set up by the landlord as a ground of forfeiture (*a*).

IV.—Consequences of Assignment.

By landlords.—There is no law in India against the assignment of contracts or "choses in action" (*b*), and hence Indian law, as to the consequences of assignment by a lessor or a lessee, is free from many niceties which perplex the corresponding branch of English law (*c*). The general rule of Indian law

(*a*) *Amritnath Chowdhari*, H. C., 27th August, 1862. See R. B., 6,105. 16th August, 1829.

(*b*) *Jaga Mohan Lall*, H. C., 4th February, 1868. But see *Jamila*, H. C., 10th January, 1863.

(*c*) "At Common Law, the rule that a contract cannot be assigned, though an estate may, produced extremely awkward consequences when a landlord assigned his reversion. In such cases the occupying tenant was bound to pay rent to the assignee, and might be sued in 'Debt' for it, for that liability was considered to arise out of his relation to the land, and to be inseparable from it, but, inasmuch as covenants are distinct contracts, and not any essential, part of a lease, it was held that if the landlord assigned reversion, the

is that, in the absence of express stipulations, the persons in actual possession as landlords or tenants are bound by the terms of the tenancy during their own possession only. The assignee of a landlord, when the assignment has been duly notified to the tenants, has the same rights and remedies against the tenant and his assigns as the original landlord had; and the assignee of a tenant, when such assignment has been duly registered or licensed by the landlord, has the same rights, remedies, and liabilities as the original tenant had And, in the absence of express stipulation, these rights and liabilities commence when the assignee (landlord or tenant) comes into possession, and cease when he assigns his interest to another in due form. Thus, when a landlord duly assigns his interest, the assignor is entitled to recover all rents due up to the date of the assignment, and the assignee all falling due after that date (*a*). By Section 55, Act XI, 1859, "arrears which on the latest day of payment may be due to the defaulter from his *ryots*, shall be recoverable by him after the said latest day by any process except distraint, which might have been used by him for that purpose on or before the said latest day." The High Court in one case remarked as follows:—"It is very clear from Sections 7 and 55, Act XI, 1859, that the defaulter is entitled to all the rents of the estate due up to the latest day of payment of the revenue instalment, *i.e.*, in the present case, up to the 29th *Pous*. It is equally clear from Section 30 that the revenue for the month of *Pous* is due from the purchaser on the next instalment which takes place after the 29th *Pous*. It is attempted to make

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assignee could not sue on the covenants contained in the lease, nor be sued upon them." The Statute 32, Hen. VIII, Cap. 34, allowed assignees to sue and be sued in the same way as the assignors. But it has been construed to apply only to such covenants as "touch and concern the thing demised," which are said to "run with the land."—Smith, 283-6.

(*a*) The rule of English law is similar. The rent is said to be "apportioned" between the assignor and the assignee, and if the assignee collects the whole, he is liable to account for it.—I. Stephen's Blackstone, 687.

out that the defaultor is liable to pay the revenue due up to the latest date of payment, under the wording of Section 31 of the Act, which says 'that the Collector shall apply the purchase-money first to the liquidation of all arrears due from the estate upon the latest day of payment.' But we think that, as the revenue of Pous was not due till three months after, these words cannot be held to mean that the Collector should have deducted from the purchase-money the arrears up to 29th *Pous*. The revenue for *Pous* was not due from the estate upon the 29th *Pous*, the latest day of payment." The Court, therefore, held that the purchaser could not recover from the defaulter rents which become due before the latest day of payment (*a*). In cases of attachment under Regulation VII, 1799, Clause 3, Section 23 of that Regulation provides that no anticipation of rent will be permitted. "The landholders and farmers are forbidden to demand or receive, and the *ryots* and other under-tenants to pay, any part of the rents receivable by the former and payable by the latter before the stipulated or usual period of payment, according to the *kistbandi* or other engagement, or established local usage; and no person hereafter making anticipated payments against this prohibition, or producing receipts for such, whether collusive or otherwise, shall be entitled to credit for the amount from the officers of Government who may attach the land or farm, or from the landholder or farmer, if it be made for arrear due from an under-tenant, under the provisions (*now repealed*) contained in this Regulation; nor shall credit be allowed for any payment made to a defaulter, after proclamation of the attachment of his estate or farm, until further proclamation be made that such attachment has been withdrawn; unless it can be clearly shown that such proclamation (which is to be made as public as possible throughout the attached lands immediately on the attach-

(*a*) *Khema Sundari Dasya*, H. C., 30th November, 1865, *Sheogholam Singh*, N. W. P., 19th June, 1854.

ment taking place) was notwithstanding unknown to the party making payment to the defaulter at the time when such payment may have been made. Provided, however, that nothing herein contained shall be understood to exonerate the defaulter from crediting to his under-tenants (*a*), or otherwise accounting for all sums received by him, whether in anticipation of the rents or subsequent to the attachment of his estate or farm, the above restriction having reference to the attachment only." It has been held that this prohibition of anticipations of rent only applies to estates attached under this Regulation (*b*); as in ordinary cases, and when there is no question of an assignment, landlords are entitled to anticipate their rents (*c*). The prohibition was held not to apply to a case in which the *zamindar* made a voluntary assignment of the rent due to him in liquidation of a loan from the tenant (*d*). When it was proved to be the custom to pay rents in advance, it was held that an auction-purchaser could not recover from the *ryots* rents collected by the defaulting *zamindar*, but that the latter must be held to have collected the rents in trust for the purchaser (*e*).

Sometimes assignees, by private sale, take over all the liabilities and claims of the assignor by express contract to that effect. In one case the Sudder Court said: "Though the purchaser of an indigo factory commonly takes over the rights and liabilities of his predecessors, this is only by express contract in each case between himself and his vendor, and there is no foundation for the popular belief that, without such express contract in each case, the assignee is entitled to all rent due to the vendor, and is responsible for all the debts of the latter" (*f*). After the

(*a*) Tenants paying rent in advance, and compelled to pay over again to the purchaser, may sue the defaulter for a refund.—S. D., 1856, 1017.

(*b*) *Attaphi Moula*, II C., 21st August, 1862

(*c*) *Muhammad Darwar-az-zumra*, S. D., 1852, 407.

(*d*) S. D., 1856, 589.

(*e*) S. D., 1854, 412.

(*f*) S. D., 1848, 186. See S. D., 1856, 190, 1857, 720.

execution of a bill of sale, by which a factory is made over with all outstanding debts and balances *(dena paona)*, the vendor cannot sue for rent which was due previous to the sale (*a*). So, when a *thikadar* had assigned his lease with all outstanding balances, the assignee was entitled to sue for rents which became due before assignment (*b*). But an assignee has no right to rents which fell due before the assignment, unless there be a special contract to that effect. If, in the absence of such contract, an assignee collects rents which fell due before assignment, he is considered to hold them in trust for the assignor, and the assignor may sue him for them (*c*). When a landlord had ostensibly sold his estate, and put forward the assignee as the proprietor and the proper person to receive the rents, and the tenant paid him rent accordingly, the assignor could not claim the rents a second time (*d*).

As to the other conditions of the tenancy, it has been held that all the stipulations and conditions of the original lease, whether they relate to the rate of rent (*e*), to the mode of paying it (*f*), or to forfeiture on non-payment (*g*), are as binding upon the assignee as they were upon the assignor before assignment Thus it has been held that an abatement of rent made in good faith is binding on the party who succeeds to the rights of the landlord who made the abatement (*h*). When a lessor mortgaged his estate, the lease was not voided, but was binding on the mortgagor (*i*). But the fact of a *zamindari* having been sold sub-

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(*a*) *Gyantri Debya*, S. D., 1849, 497.

(*b*) *J. Baddeley*, S. D., 1855, 88.

(*c*) S. D., 1845, 488.

(*d*) *J. Smith*, H. C., 2nd December, 1864.

(*e*) S D., 1845, 243, *Prankissen Pal*, H. C., 11th March, 1863.

(*f*) S. D., 1851, 557, X, N. W. P., 408.

(*g*) S. D., 1859, 174; 1191.

(*h*) *Dhurm Narain Singh*, S. D., 1855, 90. See *Mohesh Lall*, H. C., 21st September, 1867.

(*i*) *Dataram Singh*, S. D., 1849, 341.

ject to a *mukarrari* holding. does not prevent the purchaser from putting the alleged *mukarraridar* to the proof of his title (*a*). When a farmer lent money to his landlord upon an assignment of the rent, and the landlord afterwards granted his estate in *putnee*, it was held that the farmer was entitled to deduct the amount in paying his rent to the *putneedar* (*b*). Ordinarily, the purchaser or transferree of an estate cannot sue a *putneedar* for a fresh *kabuliyat*, except under special circumstances, such as the loss of the original *kabuliyat*. "If the *putnee* tenure has been created and is in existence, the original *pottah* and *kabuliyat* are sufficient to evidence the title, and do not require renewal upon the transfer, by sale or otherwise, of the *zamindari*" (*c*). But if the *zamindari* rights in a specific portion of a *putnee* be transferred, it is said that the purchaser may sue for a *kabuliyat* on account of the portion comprised within the portion purchased by him (*d*). It is expressly provided that sharers of a joint estate, when they acquire by *butwarrah* a particular portion of the estate, are bound by the engagements previously subsisting with the *ryots*, and cannot raise the rents otherwise than as the joint sharers might have been entitled to raise them (*e*). On the other hand, the Western Court has held that, when an estate has been sold in execution of a civil decree, the purchaser is not bound by an agreement not to enhance the tenant's rent, entered into by the original landlord (*f*).

Consequences of assignment by tenants.—When a transferable tenure is assigned, and the transfer duly registered, or when

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(*a*) *Modusuden Sirkar*, H. C., 26th February, 1866.

(*b*) *Kissen Chunder Rai*, S. D., 1851, 557. But if the estate had been attached under Regulation VII, 1799, it appears that such a contract would be invalid, as an anticipation of the rents.

(*c*) *J. Beckwith*, H C., 26th September, 1864.

(*d*) *Rajkissen Mukherjya*, H. C., 18th November. *Per* Morgan and Pundit, JJ.

(*e*) Section 3, Regulation XLIV, 1793.

(*f*) *Gholam Hyder Khan*, N. W P., 18th April, 1864 (?)

a non-transferable tenancy is assigned with the licence of the landlord, in the absence of express stipulations, the assignor ceases to be liable for the rent falling due after the date of sale and the assignee's liability commences from the same date (*a*). Each succeeding tenant, in the absence of express contract, is liable only for the rent which falls due during the period of his own possession (*b*). It has been said that the natural presumption, with regard to a party purchasing, is that he takes upon himself the liabilities incident to his purchase only from the date of the sale. It rests with any one attempting to attach liability to him for demands that accrued previous to his purchase, to prove that he has accepted such liability by special engagement, or otherwise (*c*). Thus, a person who purchased from a farmer under a deed of conditional sale, and afterwards foreclosed, was not liable for rent which accrued before the period of his own possession (*d*). But it is frequently made a part of the arrangement, especially in transfers of indigo factories, and of the leases appertaining to them, that the assignor shall be liable for all outstanding balances of rent. And it is sometimes said that, whenever factories are transferred with their *dena paona*, the purchaser is always understood to be liable for back rents (*e*). And when the assignee has contracted to pay back rents, suit lies in the Collectorate (*f*). In a case in which the deed of sale was not forthcoming, it was held that this circumstance, taken with the special features of the case, was enough to warrant the presumption that there had been an agreement rendering the assignee liable for outstanding balances (*g*). In a recent case the facts were these:—By indenture dated 15th March,

(*a*) S. D., 1856, 199.
(*b*) S. D., 1858, 82.
(*c*) S. D., 1858, 1814.
(*d*) S. D., 1857, 1019.
(*e*) S. D., 1848, 186; S. D., 1856, 10.
(*f*) *Ashutosh Chuckerbutty*, H. C., 20th February, 1866.
(*g*) S. D., 1847, 172.

1857, M. assigned to K. his moiety of a factory, and it was covenanted that K. should take over the *dena paona* account of the factory in respect of the moiety sold, as the same stood on 30th September, 1856. On K. being sued for rents which had fallen due before that date, he pleaded that he had covenanted to take over such debts only as were mentioned in a certain schedule, dated 30th September, 1856, which was not directly referred to in the indenture. The indenture had been registered, but the schedule not. Three Judges remanded the case for enquiry, whether the covenant was to take over all the debts due on 30th September, 1856, or only those entered in the schedule of that date. Two others dissented, holding that, when the deed of sale contains the *dena paona* clause, the purchaser is always understood to be liable for back rents. It was further observed in this case that, if a trader or other person assigns to another, and that other contracts to pay the debts of the assignor, the contract and the assignment together create a liability to the creditors (*a*). But when there is no such clause, the assignee cannot be made to pay rents which became due before assignment (*b*). When a transferree of a tenure had registered his name, the *zamindar* could not oust him in execution of a decree obtained against the former tenant for old arrears (*c*).

As to the liability of persons succeeding deceased tenants by inheritance, there have been contradictory decisions. In some cases it has been held that the heirs of a deceased tenant are liable for rent under the *kabuliyat* given by him, whether they are in actual possession or not (*d*). In another case of

(*a*) H. C., 8th April, 1864.

(*b*) S. D., 1856, 199.

(*c*) *Amrit Lall Bose*, H. C., 24th March, 1865; *Nutifan*, 26th July, 1866.

(*d*) *Srigopal Pal Chowdhry*, H. C., 6th May, 1863.—The Judges in the former case also referred to S. D., 30th June, 1857, and to a case quoted in Williams on Executors, pp. 1589-93. It is not perfectly clear from the report of this case whether the rent, for which the heirs were sued, accrued prior to, or after, the original tenant's death.

a suit against the heirs of a deceased farmer for rent which had accrued after his death, it was held that the obligation of the heirs to pay this rent depended upon proof of occupancy, either actual or constructive. A decree against the heirs for the rent of one year is strong *primâ facie* evidence that they continued in possession the following year, but this evidence is capable of being rebutted by strong evidence to the contrary (*a*). When the heirs pleaded that, by a *sulanama* executed by the different members of the family of the original lessee, a single member of the family was in sole possession, and alone liable, the Court held that, as after the death of the original lessee the heirs had interfered with the property, and opposed the lessor when she attempted to determine the lease, they were liable for the rent (*b*). When an heir denies that he is in possession, it is for the landlord to prove it (*c*). The weight of authority is in favour of the view that heirs of deceased tenants are not liable for rents which accrue after the original tenant's death, unless they enter upon possession. As to balances of rent which accrued before the original tenant's death, the heirs are, of course, liable for these up to the extent of the assets inherited by them from the deceased tenant, whether they enter upon possession or not (*d*), as property devolving by inheritance always descends with its existing liabilities (*e*). When a tenure is transferred by sale in execution of a decree for arrears of rent due from it, the purchaser is bound to register the transfer (*f*). The liability of the purchaser commences from the date of sale, and that of the defaulter ceases at that date, with regard to future rents. But any balance of former rents unsatisfied by the sale becomes a personal debt of the defaulter, and may be satisfied by sale of

(*a*) *Khwaja Abdul Hossain*, H. C., 23rd February, 1862.
(*b*) *Khwaja Abdul Hossain*, H. C., 22nd August, 1864.
(*c*) S. D., 1857, 1434, 1473 ; S. D., 1858, 348, 1096.
(*d*) S. D., 1856, 97 ; see *Nilmani Singh Deo*, H. C, 26th February, 1863.
(*e*) S. D., 1850, 29.
(*f*) Section 17, Act VIII, 1865, B.C., Section 7, Regulation VIII, 1819.

his remaining property (*a*). A purchaser at a sale under a Civil Court decree in like manner is liable only for the rent which accrues after the date of the confirmation of the sale, or granting of the sale certificate (*b*). When a tenure passed to Government by confiscation under Act XXV, 1857, Government was held liable for the rent from the date of confiscation (*c*).

Assignees of tenants, like assignees of landlords, are bound by all the terms of the original lease, though they may not have given a fresh *kabuliyat*, or taken a fresh lease (*d*). When a man purchases a tenure sold in execution of a decree, he is bound by all the stipulations of the original lease, in the same way as a purchaser by private sale (*e*). But when a ryot purchased only a portion of the land held under a lease, it was held that he was not bound by the terms of the lease relating to the whole area of the land (*f*). When a man purchased lands from Government as waste, under Act XXIII, 1863, and was afterwards sued for a *pottah* by a third party, it was held that, the transfer under that Act being absolute, the suit would not lie (*g*).

When A. purchased an estate from B. as a *zamindari*, and it was afterwards discovered that a portion of it was *putnee*, the purchaser was held liable for the *putnee rent* (*h*). A right of occupancy is unaffected by a transfer recognised by the *zamindar* (*i*). The cases as to suits for possession brought by transferees against landlords are collected in Chapter IV., under Right of Quiet Possession.

(*a*) Section 105, Act X, 1859, Clause 3; Section 17, Regulation VIII, 1819; S. D., 1845, 488.

(*b*) *Sriram Biswas*, H. C., 20th March, 1866; S. D., 1859, 408; X, N. W. P., 541.

(*c*) *Nilmani Singh Deo*, H. C., 26th February, 1863.

(*d*) S. D., 1855, 90; S. D., 1860, 190.

(*e*) S. D., August, 1860, 150.

(*f*) *Durga Churn Dutt*, S. D., 1852, 806.

(*g*) *Magan Pollan*, H. C., 17th May, 1867.

(*h*) *Ashutosh Dey*, VI. S. R., 183.

(*i*) *Hara Chunder Guhu*, H. C., 6th April, 1866.

CHAPTER VII.

RESUMPTION OF INVALID RENT-FREE GRANTS.

The points to be considered are (1) what invalid grants are within the purview of Section 28, Act X; and (2) the procedure in resuming them.

1.—What Grants are Invalid.

Section 10, *Regulation XIX*, 1793, runs thus:—"All grants for holding land exempt from the payment of revenue, whether exceeding or under one hundred *bigahs*, that have been made since 1st December, 1790, or that may hereafter be made, by any other authority than that of the Governor-General in Council, are declared null and void; and no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil, or the rents of it." By Section 24, Regulation XII, 1805, the date after which all grants in Cuttack are void is 14th October, 1803. Although this enactment is framed in absolute terms, it has been held by the majority of a Full Bench that rent-free grants, made for a consideration beneficial to the estate in general, and, therefore, tending to the security of the revenue, are not prohibited, and are valid. In the particular case in question, the land had been granted for the construction of a public tank, and the Officiating Chief Justice observed: "So far from prejudicing the interests of Government, the grant, by securing water for the use of the inhabitants of the village, appears to have been an essential means of placing the *zamindar* in a position to realize the Government revenue, and increasing the security of the Government. It was, therefore, clearly not within the mischief

intended to be guarded against by the Regulations above referred to, and, therefore, may be said to be out of the purview of the enactment. Again, water may be treated as the produce of the land, and the right to take it may be considered as of the nature of a rent in kind" (*a*). Similar grants were also held valid by the Sudder Court (*b*), but not in all cases (*c*). In another case, in which land had been granted rent-free for the excavation of a tank upon the payment of a *bonus*, but there was nothing to show that the tank was a public one, for the benefit of the whole village, the grant was held to be void (*d*.)

The question has often been raised whether, when a rent-free grant has been made for valuable consideration by a *zamindar* after 1st December, 1790, the grant is void as against the grantor himself and his heirs or vendees by private sale; as, if so, Section 10, Regulation XIX, 1793, would appear to contravene the general principles of law, which forbid a man to take advantage of his own wrong, or to invalidate the act of his ancestor. In some cases, the late Sudder Court held that such grants were void as against an heir or private purchaser (*e*), and the North-Western Court has also lately held this view (*f*). But, on the other hand, there have been numerous rulings to the contrary (*g*). Mr. A. Dick, one of the Judges who heard the case, in 1855, above-mentioned, dissented from the opinion of the majority, and held that rent-free grants are not resumable by the heir of the grantor. He said: "The law could not intend to declare that the party who had made the grant could at pleasure resume it, whether

(*a*) *Paziru Din*, H. C., 9th January, 1865, F. B.—Per Norman, C. J., Loyinge and Pundit, J.J.; Trevor and Loch, J.J., dissenting.

(*b*) S. D., 1847, 447; 1856, 74; 1858, 968.

(*c*) See S. D., 1855, 395; and 1852, 967.

(*d*) *Chunder Kant Chuckerbutty*, H. C., 3rd August, 1865.

(*e*) S. D., 1855, 395.

(*f*) *Dilsukh Rae*, N. W. P., 8th January, 1865.

(*g*) VI. S. R., 281; S. D., 1847, 447; *Moti Singh*, N. W. P., 30th July, 1853; *Mihrban Singh*, N. W. P., 29th May, 1854, *Shib Lall*, N. W. P., 10th August, 1861.

given for valuable consideration or not, or intend to entitle the heirs of such grantor to resume. This would be authorizing such persons to repudiate their own acts and the acts of their ancestors. Grants of the nature in question, *quoad* the grantors and their heirs, affect not the public revenue: they affect simply their own rental. The grantor continues himself to pay the public revenue; and, if he do not, the estate is sold, and then the grant becomes null and void. Section 10 was enacted to prevent alienations prejudicial to the security of the public revenue, not to enable proprietors and their heirs to profit by their own wrong. The proprietors and their successors, who are authorized to resume at pleasure, are not those who made the grants, or their ancestors. An auction purchaser can annul grants and alienations. This the law declares. All *bonâ fide* alienations are binding on those who made them, and on their heirs. This justice requires, and our precedents have decided." The question has now been settled in accordance with this view, by the decision of a Full Bench (*a*). The point on which the question turns is what the Legislature meant by "grants for holding lands exempt from the payment of revenue." The Chief Justice, in a very elaborate judgment, points out that Regulation XIX, 1793, was a "Regulation for re-enacting, with modifications, the rules passed on 1st December, 1790 (*b*), for trying the validity of titles of persons holding, or claiming a right to hold, lands exempt from the payment of revenue to Government." Regulation XIX, 1793, contained the following recital, which shows that the object of it was to prevent unauthorized alienations of revenue payable to Government, and

(*a*) *Mahomed Akil* and *Moti Lall Sen Gyawal*, H. C., 14th December, 1867.—Per Peacock, C. J., and Jackson and Macpherson, J.J.; Bayley, Norman, and Seton-Karr, J.J., dissenting; Trevor, Campbell, and Pundit, J.J., agreed with the dissenting Judges, but as they had retired before judgment was delivered, their opinions were not received.

(*b*) It is worthy of note that "rent-free" is the term used in this Regulation.

that it had nothing to do with the rents payable to the *zamindars* :—

"By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every *bigah* of land, unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter. As a necessary consequence of this law, if a *zamindar* made a grant of any part of his lands, to be held exempt from the payment of revenue, it was considered void, from being an alienation of the dues of Government without its consent. Had the validity of such grants been admitted, it is obvious that the revenue of Government would have been liable to gradual diminution." The recital then proceeds to show that numerous grants of the description above referred to had been made, and states that the following rules were made to facilitate the recovery of the public dues thus alienated, and to prevent any similar alienation being made in future. The Regulation divided the grants to be dealt with into three classes: (1) Those made prior to the grant of the *Dewani* (12th August, 1765); (2) those made between that date and 1st December, 1790; and (3) those which had been, or should be, made after 1st December, 1790. All of these are styled "grants for holding land exempt from the payment of revenue," from which, according to every sound principle of construction, independently of the rule expressly laid down in Regulation XLI, 1793, it ought to be concluded that only grants of the same nature were intended, and that the word "revenue" was used in Section 10 in the same sense as that in which it was used in the title and in the other Sections of the same Regulation." The Chief Justice comes to the conclusion that the word "revenue" in Section 10 is used in its proper sense, and not in the sense of "rent," and that the Sec-

tion must be read as if it were confined to alienations of land made after 1st December, 1790, and before the completion of the Permanent Settlement. During this period, and up to the completion of the Settlement, the Government was entitled to a proportion of the produce (or rents) of "every *bigah* of land" (to use the words of the preamble to Regulation XIX., 1793), and then alienations of rents would be necessarily alienation of revenue; but, after the conclusion of the Settlement, by which Government "limited the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of the Government proportion of the produce and the sum payable to the public," the revenue was no longer a certain proportion of the rents, but the sum fixed in the composition with the *zamindar*, and an alienation of rents, or a "rent-free grant," was no longer necessarily an alienation of revenue or "revenue-free" grant (*a*).

Section 10, Regulation XIX, 1793, further provides that "no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil, or the rents of it;" but it has been ruled by the Privy Council that this must be read subject to Clause 3, Section 3, Regulation II, 1805, which is still in force, and is as follows:— "Nothing in the preceding clause, or in any part of the existing Regulations, shall be held to authorize the cognisance of any suit whatever in any Court of Justice, if the cause of action

(*a*) This decision having confined the revenue-free grants mentioned in Section 10, Regulation XIX, 1793, and Section 28, Act X, to grants made before the conclusion of the Settlement, it would appear that suits for the resumption of rent-free grants, made since the conclusion of the Settlement, will no longer lie in the Collectorate, and that henceforward the only suits of this nature cognizable by the Collector will be suits by auction purchasers suing within twelve years of the date of their purchase for the resumption of grants made between 1st December, 1790, and the date of the Permanent Settlement of the estate.

shall have arisen sixty years before the institution of the suit; nor shall any plea on the part of the plaintiff for the non-prosecution of his claim of right during a period of sixty years after the origin of his alleged cause of action, nor any original defect of title on the part of the possessor of the property claimed, after the lapse of such period, be deemed a sufficient ground for taking judicial cognisance of any suit so preferred." The Privy Council ruled that this clause takes away from the Courts all authority to take cognisance of any suit whatever if the cause of action shall have arisen sixty years before the institution of the suit; it precludes all enquiry into any original defect in the title under which the possession commenced, and makes it unavailing to show that the possession commenced under a grant made null and void by Section 10, Regulation XIX, 1793 (*a*). This decision overrules the view formerly taken, which, as stated by the Sudder Court, was, that whenever the rent-free tenure had been created subsequently to 1st December, 1790, limitation did not apply (*b*).

II.—Resumption Procedure.

The following mode of resuming "revenue-free" grants, made after 1st December, 1790, was prescribed by Section 10, Regulation XIX, 1793:—"Every person who now possesses, or may succeed to, the proprietary right in any estate or dependent *taluk*, or who now holds, or may hereafter hold, any estate or dependent *taluk*, in farm of Government, or of the proprietor, or any other person, and every officer of Government appointed to make the collections from any estate or *taluk* held *khas*, is authorized and required to collect the rents from such lands at the rates of the *Pergunnah*, and to dispossess the grantee

(*a*) *Chandrabali Debya*, Sutherland P. C., 602. Similarly it was held in the Burdwan Raja's case (IV Moore, 466) that the limitation prescribed by Clause 2, Section 2, Regulation II, 1805, applies to proceedings instituted by Government for the resumption of lands under Regulation II, 1819, and III, 1828. This overruled S. D., 1848, 460, 873; 1847, 183; 1856, 489.

(*b*) S. D, April, 1861, 151.

of the proprietary right in the land, and to re-annex it to the estate or *taluk* in which it may be situated, without making previous application to a Court of Judicature, or sending notice of the dispossession or annexation to any officer of Government; nor shall any such proprietor, farmer, or dependent *talukdar* be liable to an increase of assessment on account of such grants which he may resume and annul during the term of the engagement that he may be under for the payment of the revenue of such estate or *taluk* when the grant may be so resumed and annulled. The managers of the estate of disqualified proprietors, and of joint undivided estates, are authorized and required to exercise, on behalf of the proprietors, the powers vested in proprietors by this section."

This procedure was altered by Section 28, Act X, 1859, which is as follows:—

"So much of Section 10, Regulation XIX, 1793, and Section 24, Regulation XII, 1805, as authorizes and requires proprietors and farmers of estates and dependent *taluks*, in cases in which grants for holding land exempt from the payment of revenue have been made subsequent to the dates specified in the said sections, of their own authority to collect the rents of such land, and to dispossess the grantees of the proprietary right in the land, and to re-annex it to the estate or *taluk* in which it may be situate, is repealed; and any proprietor or farmer who may desire to assess any such land, or to dispossess any such grantee, shall make application to the Collector, and such application shall be dealt with as a suit under the provisions of this Act. Every such suit shall be instituted within the period of twelve years from the time when the title of the person claiming the right to assess the land or dispossess the grantee, or of some person claiming under him," (*quære*, under whom he claims?) (*a*) "first accrued."

(*a*) It appears that the words "claiming under him" are a mistake for "under whom he claims," as the latter words are used in the corresponding section (Clause 14, Section 1) of Act XIV, 1859, and the legislature could never have intended that on every succession to the *zamindar* by

Concurrent Jurisdiction of Civil Court.—After numerous conflicting decisions, it was settled by the Full Bench decision, in the case of *Sonaton Ghose* (*a*), that the Civil Court has a concurrent jurisdiction with the Collector to hear these suits. The rules laid down in that case are thus stated in the case of *Khelat Chunder Ghose* (*b*) :—

1. "That, prior to the enactment of Regulation II, 1819, the Civil Courts were competent, under their ordinary jurisdiction, to try suits for possession under Section 10, Regulation XIX, 1793.

2. "That Regulation II, 1819, related only to suits for resumption of *lakhiraj* existing prior to 1790 (*c*), and that Section 30, Regulation II, 1819, did not extend the jurisdiction of Collectors to suits under Section 10, Regulation XIX, 1793.

3. "That by Section 28, Act X, 1829, the jurisdiction of Collectors was extended to the trial of cases under Section 10, Regulation XIX, 1793, and that from the time that law came into operation, there was a concurrent jurisdiction in the Civil Courts and in the Collector to try these cases.

4. "That when proceedings have been instituted before 31st December, 1861, (*i.e.*, before the new law of limitation came into operation,) to enforce a right under Section 10, Regulation XIX, 1793, in the Civil Courts, the law of limitation does not apply (*d*).

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inheritance, the heir should obtain a fresh start from which to reckon his limitation. The High Court has ruled that, when an auction purchaser has allowed 12 years to elapse before suing under this section, the right of action does not revive upon the succession of his heir.—*Nabi Baksh*, H. C., 27th July, 1864.

(*a*) H. C., 25th January, 1865, F. B, *Nund Kunwer*, N. W. P., 25th November, 1862, F. B.

(*b*) H. C., 27th March, 1865.

(*c*) *Kishen Chunder Biswas*, H. C., 2nd May, 1864, *E. C.; Bholanath Ghose*, S. D., 5th September, 1861.

(*d*) But, according to the recent ruling of the Privy Council in the case of *Chandra Bali Debya*, above quoted, the sixty years' limitation would apply to these cases.

5. "That as Section 10, Regulation XIX, 1793, applies only to grants made since 1st December, 1790, the *onus* of proving that the case falls within Section 10, or (in other words) that the grant was made since 1st December, 1790, and that the case is not affected by the law of limitation, rests with the plaintiff. He must prove that the land held by the defendant, as *lakhiraj*, is part of the *mal* land of the plaintiff, and must show that it was assessed with the public revenue at the time of the Decennial Settlement. If he prove this fact, it may be presumed that the right under which the defendant claims to hold as *lakhiraj* commenced subsequently to 1st December, 1790, unless the defendant gives satisfactory evidence to the contrary. If the plaintiff fail to give the necessary proof, the issue as to limitation must be found for the defendant.

6. "That a suit alleged to be brought under Section 30, Regulation II, 1819, must be assumed to refer only to a *lakhiraj* tenure created prior to 1st December, 1790, and is necessarily not one to which the rule, created by Section 10, Regulation XIX, 1793, of exemption from limitation applies.

7. "That if a plaintiff have erred in stating that his suit is brought under Section 30, Regulation II, 1819, he may amend the plaint by striking out this allegation.

8. "That if the plaintiff amend his plaint, he must comply with the provisions of Clause 3, Section 26, Act VIII, 1859, by stating when his cause of action accrued, and if the cause of action accrued beyond the period ordinarily allowed, the ground on which exemption from the ordinary law is claimed."

As to limitation in the Civil Court, in the case of *Khelan Chunder Ghose*, it was observed that the cases referred to by the Full Bench were instituted previous to the coming into operation of Act XIV, 1859. In all suits commenced subsequent to that date (31st December, 1861), the effect of Clause 14, Section 1, Act XIV, 1859, on the plaintiff's suit must be considered. That clause provides that, "in estates perma-

nently settled, no suit to resume or assess *lakhiraj* or rent-free land shall be maintained, if it is shown that the land has been held *lakhiraj* or rent-free from the period of the Permanent Settlement" (*a*). Under Clause 14, Section 1, Act XIV, 1859, a suit to assess rent-free land must be brought within 12 years of the accrual of the title of the person claiming the right to assess, or of some person under whom he claims, whether the allegation be that the land has been held rent-free from a date before or after the Permanent Settlement (*b*). In a case which was instituted after Act XIV came into force, the Court said: "The real question is—does defendant prove possession from 1790? and, so far, the *onus* is on him. But that *onus* must not be imposed in a harsh way, such that, after so long a lapse of time, an honest holder cannot bear it, and *bonâ fide* holdings may be unjustly imperilled. It is not necessary that defendant should give direct proof of his holding to the exact date of the Permanent Settlement, but that he should give such evidence of long possession, of the character and repute of his holding, and otherwise, that the Court may be led to believe that the holding is really one of ancient date, as old as the Permanent Settlement, and not a modern appropriation" (*c*).

Res judicata.—A suit may be brought in the Civil Court to resume land under Section 10, Regulation XIX, 1793, after the Collector has dismissed the claim, upon the ground that the land has not been shewn to have paid rent since 1790. In this case the allegation was that the defendant had set up a false rent-free title, and the Court held that in the Civil Court the plaintiff need not start his case by showing that the land had once

(*a*) It has been held by a Full Bench in the case of *John Poulson*, 18th January, 1865, that Act XIV, 1859, does not apply to suits under Act X, so it would appear that this provision does not apply to suits under Section 28.

(*b*) *Krishna Mohan Dass*, H. C., 19th May, 1865.

(*c*) *A. J. Forbes*, H. C., 31st May, 1865; *Syam Lall Ghose*, H. C., 4th August, 1865.

paid rent. It was for the defendant to prove his title (*a*) But in another case it was said that a *zamindar*, who claims to resume or assess land, as his *mal* land which once paid rent to him, is bound to prove this, and cannot rely upon any legal principle or presumption (*b*) to exempt him from the necessity of giving such proof. The defendant, if he fails to support his defence of having held the land as *lakhiraj* of an earlier creation than 1790, cannot be deemed to have admitted the plaintiff's case, merely because he has failed to prove his own (*c*). In another case it was said that, if a plaintiff first sues under Section 28, and fails to prove that the land formed part of his permanently settled estate, he is not debarred from afterwards suing under Section 30, Regulation II, 1819, in the Civil Court, to try the validity of the *lakhiraj* title. But, by so doing, he admits the existence of the tenure as rent-free from the time of the Decennial Settlement, of which proof need not be required from the defendant, and the defendant's plea of limitation will be fatal to the claim, unless the plaintiff can show that he is an auction-purchaser, and has brought his claim within 12 years

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(*a*) *Prabho Dass*, H. C., 22nd June, 1864.—In the case of *Dwarkanath Samant*, H. C., 30th June, 1864, it was said that this could not be done.

(*b*) *e.g.*, Clause 3, Section 3, Regulation XIV, 1825.—"The ruling power is entitled to a certain proportion of the produce of every *biyah* of land, except so far as it shall have transferred, relinquished, or compounded its right thereto, all parties claiming the benefit of such exception being bound to establish their respective claims and title."

(*c*) *Joy Kissen Mukharyya*, H C., 15th July, 1864 —In the Full Bench ruling, in the case of *Sonaton Ghose*, above quoted, it was said that, whether a plaintiff proceed in the Civil or in the Revenue Court, the *onus* is on him to prove that the land was assessed to the public revenue at the Permanent Settlement. But in the case of *Syam Lall Ghose*, (H. C., 4th August, 1865,) it is said that, when the plaintiff is an auction-purchaser, the *onus* of proving that the land is *lakhiraj* is on the *ryot*, and that it is not necessary for the landlord to start his case by proving the land has once paid rent.

of his purchase (*a*). Suits to resume and assess invalid *lakhiraj*, on the allegation of a holding prior to the period of the Permanent Settlement on an invalid title, must be necessarily dismissed under the proviso to Clause 14, Section 1, Act XIX, 1859, notwithstanding any ambiguity in the wording of the plaint (*b*).

Suits under Section 28.—A suit under this section can be maintained solely upon the ground mentioned in Section 10, Regulation XIX, 1793; *viz.*, that the grant under which defendant holds was made after 1st December, 1790; a suit under this section cannot be maintained on the ground that the defendant holds under an invalid tenure of date previous to 1790 (*c*). It is incumbent on the plaintiff to show that rent has been paid in respect of the land since the *Decennial* Settlement (*d*), or that the land was assessed to the public revenue at the Permanent Settlement (*e*). If it be proved that the tenure was in existence before 1790, the Collector has no power to try its validity, or otherwise, or any question bearing upon that issue (*f*). The *onus* of starting the case by proof that the lands were once *mal* always lies on the plaintiff, and an illegal ouster of the *lakhirajdar* will not shift this *onus*. In the suit for reinstatement, it will still be upon the *zamindars* (*g*). There appears to be some difference of opinion as to the party on whom the *onus* lies in suits in the Civil Court, under Section 10, Regulation XIX, 1793, but in all the Act X rulings it is said to rest on the plaintiff. When a plaintiff sues to enhance, and defendant sets up a *lakhiraj* title, it is for the former first to show that the land is *mal*.

(*a*) *Ram Churn Dutt*, H. C., 30th June, 1864.

(*b*) *Sheik Mujan*, H. C., 9th August, 1864

(*c*) *Indurjit Kunwer*, H. C., 19th February, 1863.

(*d*) *Tarini Prasad Ghose*, H. C., 10th December, 1862; *Dwarkanath Samant*, H. C., 30th June, 1864.

(*e*) *Sonaton Ghose*, H. C., 22nd February, 1865, F. B.

(*f*) *Ram Nidhi Bardhya*, H. C, 18th March, 1864.

(*g*) *Jogishwar Dass Rai*, H. C., 27th March, 1865, *Harihur Mukharjya*, H. C., 21st December, 1863.

Defendant's evidence should be looked at only if the plaintiff makes out a *primâ facie* case (*a*). Suits for the assessment of land alleged to have been unassessed at the Permanent Settlement are barred by limitation (*b*).

As to the parties entitled to sue, it has been held that a *putneedar* may do so (*c*), but not a manager of a religious endowment, as he has no right either to the name or the privileges of a *zamindar* (*d*). A mere householder cannot sue under this section (*e*).

It was formerly held that the appeal from orders under Section 28 lay to the Commissioner (*f*), and this view is confirmed by a Full Bench ruling of the North-Western Court (*g*); but the Calcutta Court has since ruled that the appeal lies to the Judge (*h*).

The cases as to resumption of service tenures have been already given in Chapter I. The general rule is, that a service tenure is liable to resumption on failure to perform the service (*i*).

(*a*) *Mritunjoy Chuckerbutty*, H. C., 9th July, 1866.

(*b*) *Hara Mani Debya*, H. C., 22nd February, 1865.

(*c*) *Gya Ram Mundul*, H. C., 29th July, 1862.

(*d*) *Novin Chander Rai*, H. C., 18th July, 1865 (?)

(*e*) *Gunesh Ram Joshi*, N. W. P., 30th July, 1862.

(*f*) *Ramkumar Mukharjya*, S. D., 22nd August, 1861.

(*g*) *Ramzan Ali*, N. W. P., 25th November, 1862, F. B.

(*h*) *Bissumber Misser*, H. C., 18th March, 1863.

(*i*) *Nilanand Singh*, 6th June, 1866.—But see *Monorunjon Singh*, 17th June, 1865.

CHAPTER VIII.

SUITS AGAINST AGENTS.

Section 24, *Act X*, 1859, is as follows:—"Suits by *zamindars* and others in receipt of the rent of land against any agents employed by them in the management of land, or collection of rents, or the sureties of such agents, for money received, or accounts kept by such agents in the course of such employment, or for papers in their possession, shall be cognizable by the Collectors, and shall be instituted and tried under the provisions of this Act, and shall not be cognizable in any other Court except in the way of appeal, as provided in this Act."

Who may be sued.—An agent for the receipt and custody of rents collected by others and paid to him, cannot be sued under this section (*a*). *Amlah* and other servants, not directly employed in the management of land or collection of rents, cannot be sued under this section (*b*). An agent employed in making settlements, giving leases, &c., and in this capacity receiving rent direct from the lessees, may be sued (*c*). A suit by one of a body of *putneedars* against his *co-putneedars*, for his share of the rents collected by them, will not lie under this section (*d*). It was held that a son-in-law, who acted as *sarburakar*, and had the entire management of the plaintiff's property, and gave receipts for the rents collected by his *tahsildar*, was an agent within the meaning of this

(*a*) *Kaniram Purkha*, H. C., 21st September, 1863.
(*b*) *Lalla Rattan*, H. C., 17th February, 1863.
(*c*) *Lalla Jivan Lall*, H. C., 2nd July, 1864.
(*d*) *Subhal Singh*, H. C., 17th February, 1864.

section (*a*). A suit will not lie for the recovery of rents collected by a person without authority, who has not been employed as agent (*b*). The sureties of an agent may be made co-defendants with him. The heirs of a surety are liable only if the terms of the surety bond expressly extend such liability to them, and in that case they are liable to the extent of the property which they have inherited from the deceased surety (*c*). The suit under this Section lies none the less because defendant may be amenable to the Criminal Court (*d*). An intervenor cannot be made a party under this Section (*e*). In a recent case an opinion was expressed that a suit for delivery of accounts would lie against the heir of an agent, but the suit was dismissed upon the ground that the plaintiffs resided at the sudder *cutcherry*, and that the accounts were in their custody (*f*). A suit against an agent by a party other than the one who appointed him, and who is out of possession, will not lie (*g*). A sharer may sue alone (*h*).

What may be sued for.—A suit lies under this Section for the money value of rents received by an agent in kind (*i*). In a suit under Section 24, an agent may account for monies received by showing that he paid them away for plaintiff by his authority, or to third persons at his request (*j*). A list of accounts and papers kept in *zamindari cutcherries* is given in Mr. Carmichael Smyth's "*Zamindari* Accounts." They are the following :—

"*Chithas.*—Measurement papers containing an account of all the lands in the village divided numerically into *dags* or plots.

(*a*) *Sukh Lall Tewary*, H. C., 16th July, 1864.
(*b*) *Sital Kishta Rai*, H. C., 4th May, 1863.
(*c*) *Srimati Rani Mohini*, H. C., 30th April, 1864.
(*d*) *Skinner and Co.*, H. C., 8th May, 1865.
(*e*) *Manjura Dhai*, H. C., 13th February, 1865.
(*f*) *Gowher Hossain*, H. C., 29th November, 1867.
(*g*) *Zamir Mundul*, H. C., 29th January, 1866.
(*h*) *Padamani Dasya*, H. C., 3rd March, 1868.
(*i*) *Koilas Chunder Ghose*, H. C., 27th April, 1867.
(*j*) *J. Stephen*, H. C., 4th May, 1867.

The quantity of land in each *dag*, the species of cultivation, and the name of the *ryot* to whom it belongs, are given.

"*Goshwara.*—An abstract of the *chithas*, showing the gross amount of land included therein.

"*Khutiyan.*—Another abstract showing the quantity of land held by each *ryot* in each '*mehal*' (*e.g.*, in the *khamar*, in the *ryotti*, in the *lakhiraj* '*mehals*,' *&c.*), the *chithas* in which it is contained, the number of *dags*, and the species of cultivation.

"*Ekwal* shows the gross amount of land in each '*mehal*' in each *ryot's* possession, with detail of cultivation.

"*Khutiyan Terij* shows the total gross amount of land in each *ryot's* possession, and the details of cultivation.

"*Jamabundi* shows the quantity and quality of land in each *ryot's* possession, the rates, and the total rent of each *ryot*.

"*Towjee* is the detail of the *kists*, or instalments, in which the rent is payable.

"*Talub baki* shows the demand, collections, and balance against each *ryot*.

"*Kharcha hisab* shows the total demand, total collections, and total balance due on the estate.

"*Jama wasil baki* is a detailed account of the rent demandable, the rent collected, and the rent due from every *ryot* on the estate.

"*Seeáha* is the daily ledger, or account book of receipts and disbursements.

"*Terij jama kharcha* is an abstract of the *seeáha*, which is generally submitted by the *gomashta* at the close of the year."

All these papers are rarely, if ever, kept up. The papers commonly kept and sued for are the *chithas*, the *jamabundi*, the *jama wasil baki*, the *seeáha*, and the *terij jama kharcha*.

Limitation.—Section 33 provides that "suits for the recovery of money in the hands of an agent, or for the delivery of accounts or papers by an agent, may be brought at any time during the agency, or within one year after the determination of the agency of such agent. * * * Provided that, if the person having

the right to sue shall, by means of fraud, have been kept from the knowledge of the receipt of any such money by the agent, or if any fraudulent account shall have been rendered by the agent, the suit may be brought within one year from the time when the fraud shall have been first known to such person; but no such suit shall, in any case, be brought at any time exceeding three years from the termination of the agency." If a principal suspends an agent, the agency must be held to have been determined, within the meaning of this Section, from the time of the suspension (*a*). But if the agency be one for a fixed period, the mere absconding of an agent does not determine the agency (*b*). In the case of a fraudulent account, limitation runs from the date when the account was rendered (*c*). Fraud must be established on the part of the agent, not of another person, for the proviso to come into play (*d*). A suit for money upon an agent's account must be brought within one year of the date on which the account is rendered (*e*). In case of fraud, the cause of action arises at the time when the plaintiff, using due diligence, becomes aware of the receipt by the agent of the money claimed (*f*). Knowledge of the fraud is not, however, necessarily contemporaneous with the possession of means of knowing such fraud (*g*). When a suit is brought against a surety for monies appropriated by the agent for whom he is surety, Section 30, and not Section 33, is applicable. The cause of action in such cases arises on the date on which the plaintiff had the means of knowing what was due from the deceased agent, that is to say, not on the date of the agent's death, but on the date

(*a*) *Madan Mohan Rai*, H. C., 27th January, 1864; *Burdwan Rhja*, H. C., 6th June, 1866; *Radhika Prasad*; H. C., 4th July, 1866.

(*b*) *Bissessur Rai Choudhri*, H. C., 27th July, 1866.

(*c*) *A. B. Mackintosh*, H. C., 21st June, 1865.

(*d*) *Kashishwari Dasya*, H. C., 10th August, 1863.

(*e*) *Harsaran Narain Singh*, H. C., 30th July, 1866.

(*f*) *Ram Kanth Choudhri*, H. C., 17th July, 1866.

(*g*) *Dhanpat Singh Dugur*, H. C., 26th February, 1868.

of the filing of his account by the sureties (*a*). In one case it was said "After the expiration of one year, a suit for an account is barred, but if the agent deliver an account showing himself to be indebted, a new cause of action arises upon the admission by the settlement of the account. An action for the balance of the account would probably be maintainable, not under Act X, but under the rules relating to ordinary civil suits, subject only to the limitation of Act XIV, 1859 If the account delivered be fraudulent, the case falls within the proviso in Section 33 of Act X, and a suit may be brought under that Act within one year from the date whe nthe fraud shall have been first discovered by the plaintiff" (*b*) But in the case of A. B. Mackintosh, above quoted, it was held that a suit will always lie in the Collectorate within one year of the rendering of accounts.

The rules as to arrest before judgment are applicable to suits against agents (Section 49) If the arrest have been applied for without reasonable cause, damages to the extent of Rs 100 may be awarded under Section 53

Execution of decree.—By Section 84, when the defendant has been arrested before judgment, the Collector may order him to be detained in the civil jail unless he immediately comply with the decree. By Section 93: "If the decree against any person arrested under a warrant be for the delivery of papers or accounts, and the papers or accounts shall not be delivered by him when he is brought before the Collector, such person may be committed to the civil jail, there to remain for such time, not exceeding six calendar months, as the Collector shall direct, unless he shall, in the meantime, deliver the papers or accounts, according to the terms of the decree"

Ejectment of agents.—By Section 25 "If any *zamindar* or

(*a*) *Purno Sundari Debya*, II C, 8th July, 1867; *Bilas Mani*, II C, 8th April, 1863.

(*b*) *Choudhri Chatterpal Singh*, II C., 7th April, 1863

other person in receipt of the rent of land require assistance to eject any agent after the determination of his agency, he shall apply to the Collector, and the Collector shall proceed thereupon to enquire into the case, and pass orders in the manner provided for suits under this Act."

CHAPTER IX.

THE PROCEDURE OF THE REVENUE COURTS UNDER ACT X, 1859.

The Sections of Act X, and the precedents relating to procedure, will be detailed under the following heads or divisions, which, in the main, correspond with those adopted in Act VIII, 1859:—

I. The Jurisdiction of the Revenue Courts.
II. Preliminary Rules.
III. Limitation of Suits.
IV. Of a Suit till Final Decree.
V. Execution of Decrees.
VI. Of Appeals from Executive Orders.
VII. Of Appeals from Judgments in Suits and Judicial Orders.
VIII. Of Special Appeals.
IX. Review of Judgment.

I.—Jurisdiction of the Revenue Courts.

Exclusive Jurisdiction.—By Section 23, Act X, the following suits "shall be cognizable by the Collectors of land revenue, and shall be instituted and tried under the provisions of this Act, and, except in the way of appeal, as provided in this Act, shall not be cognizable in any other Court, or by any other officer, or in any other manner.

1. "All suits for the delivery of *pottahs* or *kabuliyats*, or for the determination of the rates of rent at which such *pottahs* or *kabuliyats* are to be delivered.

2. "All suits for damages on account of the illegal exaction of rent, or of any unauthorized cess or impost; or on account

of the refusal of receipts for rent paid, or on account of the extortion of rent by confinement or other duress.

3. "All complaints of excessive demand of rent, and all claims to abatement of rent.

4. "All suits for arrears of rent due on account of land either *khiraji* or *lakhiraj*, or on account of any rights of pasturage, forest rights, fisheries, or the like.

5. "All suits to eject any *ryot*, or to cancel any lease on account of the non-payment of arrears of rent, or on account of the breach of the conditions of any contract by which a *ryot* may be liable to ejectment, or a lease may be liable to be cancelled.

6 "All suits to recover the occupancy or possession of any land, farm, or tenure from which a *ryot*, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same.

7. "All suits arising out of the exercise of the power of distraint conferred on *zamindars* and others by Sections 112 and 114 of this Act, or out of any acts done under colour of the exercise of the said power as hereinafter particularly provided.

8. "Suits by *zamindars* and others in receipt of the rent of land against any agents employed by them in the management of land or collection of rents, or the sureties of such agents for money received or accounts kept by such agents in the course of such employment, or for papers in their possession" (Section 24).

Concurrent Jurisdiction.—The Revenue Courts have also jurisdiction to hear and determine—

9. "Applications to eject any cultivator not having a right of occupancy, or to eject any farmer or other tenant holding only for a limited period, after the determination of his lease or tenancy, or any agent after the determination of his agency, or to enforce any attachment or ejectment expressly authorized by any Regulation or Act" (*a*).

(*a*) Section 25, Act X, 1859.

10 Applications under Section 9, Act VI, 1862 (B C.), for orders allowing measurement and enjoining the attendance of the tenants

11. Applications under Section 10 of the same Act for measurement of land and ascertainment of the names of the occupants by the Collector; or for the ascertainment, determination, and record by the Collector of the tenures and under-tenures, the rates of rent payable in respect of such land, and the persons by whom respectively the rents are payable.

12. Applications under Section 27, Act X, respecting registry of transfers of *taluks* or tenures in the *zamindari sherista.*

13. Suits under Section 28, Act X, for dispossession of grantees of revenue-free grants made subsequently to 1st December, 1790, or for the assessment of lands held under such grants.

14. Applications under Section 13 for service of notices of enhancement.

15 Applications under Section 19 for service of notices of relinquishment.

16. Complaints under Section 145, regarding resistance of distraint.

17. Complaints under Section 147, regarding resistance of process.

There can be no suit under this Act where there is not either an actual or implied relationship between the parties of landlord and tenant (*a*). If the allegation be that the defendant is a trespasser, the Revenue Courts have no jurisdiction (*b*). But a landlord cannot get rid of the jurisdiction of the Revenue

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(*a*) *Raghu Nath Sahai*, H. C, 20th August, 1864; but see *Muhammad Kadir*, 1st July, 1864. As to mortgagees, see *Radha Kishwar*, H. C., 28th April, 1866. In suits under Sections 28 and 27, there is no such relation, the suit is instituted to create it.

(*b*) *Shib Prasad Chuckerbutty*, H C., 9th June, 1864. See cases quoted above under suits for rent and for *kabuliyats.*

Courts by merely refusing to take rent from a tenant, or by declining to acknowledge the tenant's rights (*a*). The cases as to the Collector's jurisdiction to try questions of *benami* ownership are collected in the recent Full Bench decision in the cases of *Prosona Kumar Pal Choudhri* (23rd September, 1867, F. B.) and *Judonath Pal*, 3rd January, 1868. As to the plea of rent-free holding, see *Hari Prasad Mali*, 19th August, 1862; *Gumani Kazi*, H. C., 1st June, 1863, F. B.; and *Purna Dass*, 22nd May, 1865.

It has been decided that only those portions of Act VIII which have been expressly extended to the Revenue Courts are applicable to suits under Act X (*b*).

Res Judicata.—Though Section 2, Act VIII, has not been so extended, it is of course the rule that the Revenue Courts cannot take cognizance of suits previously heard and determined. Thus, if a suit for the rent of a certain period has been dismissed, a second suit for the same rent will not lie (*c*). But an old and unexecuted or ambiguous Civil Court decree does not bar a suit (*d*). A dismissal of a suit otherwise than upon the merits, *e.g.*, for default of prosecution, does not bar a second suit for the same cause (*e*). But a suit dismissed in the presence of both parties for want of proof is dismissed upon the merits, and a fresh action will not lie for the same cause (*f*). A plea of *res judicata* may be withdrawn by consent (*g*). Suit cannot be brought in the Civil Court to set aside a lease accepted

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(*a*) *Thakur Dass Mazumdar*, H. C., 16th January, 1865

(*b*) *Dyal Chunder Ghose*, H. C., 16th September, 1862. But see *Suruth Sundari Debya*, H. C., 19th May, 1866.

(*c*) *Ishwar Chunder Bose*, S. D., 27th March, 1861.

(*d*) *Saya Mayi Debya*, H C, 16th December, 1864.

(*e*) *Dhanpat Singh*, H C, 23rd June, 1864, *Ramanath Rae Choudhari*, H. C., 12th July, 1865. But see Section 59.

(*f*) *Muhammad Choudhari*, H. C., 20th December, 1864.

(*g*) *Maya Mayi Debya*, H. C., 28th July, 1865.

by a Revenue Court (*a*). A former decree does not render null a written agreement to which it makes no reference (*b*). A decision as to the area of land held by a *ryot* in one year does not estop the *zamindar* from showing that he held a larger area in the following year (*c*). The finding of one Court cannot be questioned in another Court of concurrent jurisdiction, but it may be questioned in other Courts (*d*). When a suit for rent was brought upon a *zar-i-peshgi* lease, and the *defendant* pleaded that he had withheld the rent under the terms of a bond, and the Collector, by direction of the High Court, enquired into the genuineness of the bond, and decided it was genuine (*e*), and the bondholder afterwards sued in the Civil Court for the balance due under the bond, it was held that the Collector's decision was not conclusive, except upon the question relating to the rent, as the Revenue Court has not concurrent jurisdiction with the Civil Court in suits on bonds (*f*). An order of dismissal of a suit to resume a rent-free grant under Section 28, Act X, does not bar a subsequent suit in the Civil Court to try the validity of the title (*g*). A decree of the Collector, dismissing a suit for recovery of possession of a *taluk*, was held not to bar a fresh suit by the *talukdar* in the Civil Court, the title not having been put in issue in the former suit (*h*). A decree of a Revenue Court for rent under a *kabuliyat* against an alleged *lakhirajdar* does not bar a suit by the *lakhirajdar* in the Civil Court for declaration of title (*i*). Dismissal

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(*a*) *Shah Anwar Ali*, H. C., 26th November, 1864. This ruling is questioned in *Mussamut Edun*, H. C., 12th July, 1867.

(*b*) *N. Pogose*, H. C, 6th December, 1864.

(*c*) *Bhagabut Jha*, H. C., 22nd July, 1862.

(*d*) *Nubu Kumar Bhattacharjya*, H. C, 22nd June, 1864

(*e*) *Mussamut Bechan*, H C, 8th April, 1863, and 21st July, 1864.

(*f*) *Mussamut Edun*, H. C., 12th July, 1867.

(*g*) *Raja Rai*, II. Suth. W. R, Act X Rulings, 102.

(*h*) *Ram Chunder Gupto*, II Suth W R., Act X Rulings, 85.

(*i*) *Tara Chand Mytee*, III. Suth. W R., 227.

of a suit for rent, on the ground that plaintiff was not in possession, does not bar a suit for declaration of right to the same rent, as that right has never been tried (*a*). When the Revenue Court decreed a suit for rent, overruling a *mukarrari pottah* set up by the defendant, with the remark that it was suspicious, but without fixing or deciding an issue directly as to its genuineness or otherwise, the Court said that, under Act X, the Collector is vested with jurisdiction to try and decide finally questions of right and title, and if he does so, his decree is a bar to a fresh suit on the same cause of action; but in this case the question of title had not been decided (*b*). A Revenue Court's decree, dismissing a suit for recovery of possession under Clause 6, Section 23, does not bar a fresh suit in the Civil Court for possession (*c*). When the Collector, in a suit for assessment, found that the land formed part of the defendant's *taluk*, the defendant could not afterwards sue in the Civil Court to establish his *talukdari* right (*d*). When the Revenue Court had rejected a suit for abatement of rent, the tenant could not afterwards sue in the Civil Court to recover the excess payments made under the Revenue decree (*e*). When the plaintiff sued as *zamindar*, for the resumption of *lakhiraj* for which he had formerly sued in the character of an intermediate holder, it was held the suit would lie (*f*). A former decree, at a certain rate of rent, is no bar to a claim to hold at a lower rate (*g*). Any issue which is material to the rights of the parties in the matter of suit

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(*a*) *Dhoroni Muzumdar*, II. Suth W R, Act X Rulings, 103; *Basir Muhammad*, VII. W. R., 97; *Brojendro Kumar Rai Choudhari*, II. C., 29th November, 1864.

(*b*) *Omachurn Dutt*, H C., 6th January, 1866, see *Kumar Ali*, H C., 11th April, 1866.

(*c*) *Sooja Kant Rai*, I. In. Ju., 382.

(*d*) *Mahammad Azim*, VI. Suth W. R, 101.

(*e*) *Chuman Lall*, H. C., 14th December, 1865.

(*f*) *Michu Bhumik*, H C., 29th May, 1866.

(*g*) *Goluk Chunder Rai*, H. C., 16th February, 1866.

between them, whether actually contested or not, cannot afterwards be raised in a suit between the same parties; and in this respect a defendant brought in *ihtiatan* or *pro formâ* is exactly in the same situation as any other defendant (*a*). When the plaintiff sued for abatement of rent, on the ground of decrease of area, and the tenant pleaded that a particular measuring rod should be used, and the Judge finding that in a previous rent suit the area was found not to be diminished, dismissed the suit as *res judicata*, it was held that the order could not be sustained, as in the rent suit the issue of what measuring rod should be used was not raised (*b*). A decree in a former suit is an estoppel to a second suit for the same cause only when the parties to the second suit are the same as those in the first suit, or are privy in estate to them (*c*).

By Act III, 1839 (Section 4, Act VIII), no person is exempted from the jurisdiction of the Revenue Courts by reason of place of birth or descent.

Local jurisdiction.—By Section 20, Act VI, 1862 (B.C.), "suits under Act X or Act VI shall be preferred in the Revenue Office of the district; or, when a sub-division of a district has been placed under the jurisdiction of a Deputy Collector, in the Revenue Office of the sub-division in which the cause of action shall have arisen; or, when the cause of action shall have arisen within the limits of the local jurisdiction of any Deputy Collector not in charge of a sub-division, but who has been specially authorized by Government to receive such suits, then in the Office of such last-mentioned Deputy Collector. Provided always that the Collector may withdraw any suit from any Deputy Collector, and try it himself, or refer it to another Deputy Col-

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(*a*) *Denki Nundan Rai*, H. C., 17th August, 1867; see *Chunder Sikar Dib Rai*, III W. R., 39.

(*b*) *Srimant Mundul*, H. C., 11th December, 1866.

(*c*) *Ramdhan Mukharjya*, H. C., 26th September, 1866. See cases quoted in Chapter III, under "Plea of Estoppel by Matter of Record," in Rent Suit.

lector. If the lands comprised in any *taluk*, farm, or other tenure, or any lands held under one lease or engagement, or at one entire rent, in respect of which arrears of rent may be due, are situated in more than one district or sub-division, or within the local limits of the jurisdiction of more than one Deputy Collector so specially authorized as aforesaid, the district, or sub-division, or local limits in which the greater part of such lands is situate shall be held to be the district, or sub-division, or local limits in which the cause of action has arisen; and if any question shall be raised respecting the district, or sub-division, or local limits within which the greater part of the lands is situate, the Board of Revenue, or, if all the lands be situate in one district, the Collector of the district, shall decide the question; and such decision shall be conclusive on the point of jurisdiction." When the jurisdiction of the Collector and of the Civil Judge are not conterminous, suits will be instituted before the Collector in whose jurisdiction the land which is the subject of the suit lies, but the appeal will lie to the Judge in whose civil jurisdiction the land is situated (*a*). When the land lies in several sub-divisions, the suit must be instituted in the one in which the greatest part of the land lies. The Collector may not receive the plaint himself in the first instance, though he may withdraw it for trial after it has been filed (*b*). A suit should not be dismissed because it has been filed in the wrong sub-divisional Court, but the plaint should be returned to be filed in the right one (*c*). By Section 163, Act X, "except as provided in the last preceding Section (now Section 20, Act VI, 1862, B.C.), no Collector shall exercise any jurisdiction under this Act in respect to any lands situate beyond the limits of the district to which he is

(*a*) *Lutef-un-Nissa*, H.C., 22nd August, 1862.

(*b*) *Chunder Kant Chuckerbutty*, H.C., 15th February, 1866.

(*c*) *Suruth Sundari Debya*, H.C., 19th May, 1866. See *Mohesh Chunder Sirkar*, H.C., 7th December, 1867.

appointed, by reason of such lands forming part of an estate the revenue of which is paid into the treasury of the said district."

Deputy Collector's powers.—By Section 19, Act VI, "all the powers vested in the Collector by any of the Sections of this Act, or of Act X, may be exercised by any Deputy Collector in cases referred to him by a Collector, and in all cases without such reference by any Deputy Collector placed in charge of any sub-division of a district, or who is specially authorized by Government to receive such cases; and all applications and reports allowed or required by the said Act X, or by this Act, to be made to the Collector, may be made to any Deputy Collector having such local jurisdiction, or such special authority, as aforesaid." A Deputy Collector is not empowered by this Section to try an appeal (*a*). By Section 164 no Deputy Collector, under Regulation IX, 1833, if entrusted with Police powers, shall exercise jurisdiction in rent suits. By Section 165, Assistants to Collectors shall not exercise such jurisdiction unless vested with the powers of a Deputy Collector A Collector, during his absence from the Sudder Station, may delegate his duties, under Act X, to a Covenanted Deputy Collector (*b*).

Splitting cause of action.—By Section 7, Act VIII, every suit must include the whole claim arising out of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring it within the jurisdiction of any Court. But a suit for the portion so relinquished shall not afterwards be entertained. This Section has been held to apply to suits under Act X (*c*). Separate suits cannot be brought for the rent of

(*a*) *Kali Narain Choudhari*, H. C., 7th September, 1866, F. B., overruling *Josim Kaghazi*, H. C., 9th January, 1865.

(*b*) Board's Rules, Chapter XVI, Section 11, Clause 1.

(*c*) *Bhava Sundari*, H C., 24th June, 1864. See *Mohesh Chunder Sirkar*, H. C, 7th December, 1867, *Muhammad Sadik*, H C, 6th June, 1866.

separate parcels of land held under one lease (*a*) But arrears of rent for successive years are several and distinct causes of action, and need not be included in the same suit (*b*). The effect of splitting a claim for rent is often to change the Court to which the appeal lies, which is not permitted.

Multifarious claims.—A plaintiff cannot lump up in one suit several distinct claims (*c*). The Court should dismiss a suit brought against several defendants with no common tie as multifarious and defective, even though the plea be not raised (*d*) Section 9, Act VIII, allows the Civil Courts to order separate trials.

II.—Preliminary Rules.

Suits by agents —By Section 29, Act X, "all suits which, under the provisions of this Act, may be brought by or against *zamindars* or other persons in the receipt of the rent of land, may be brought by or against *sarbarakars* or *tahsildars* of estates held under *khas* management, whether such estates are the property of Government or of individuals (*e*). By Section 69, when suits under this Act are instituted or defended by *naibs*, *gomashtas*, or other persons employed in the collection of rent or management of land, in the name, and on the behalf of the

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(*a*) *Ajhodya Ram Khan*, II C, 27th January, 1865. As to separate suit for *kabuliyats*, see *Abdul Ali*, 27th November, 1867.

(*b*) *Satya Churn Ghosal*, H. C., 25th January, 1865.

(*c*) *Murad Ali*, II. C, 21st February, 1863. As to suits regarding several holdings, see *Durga Churn Sirkar*, 20th December, 1867, *Byoygobind Bural*, 24th July, 1867. See also *Rayender Kishwar Singh*, P. C, 10th February, 1866.

(*d*) *Ganesh Prasad*, II. C, 24th June, 1864. See "Plea of Multifariousness," in Chapter III, under Rent Suits.

(*e*) In Section 25, Regulation VII, 1799, *khas* management is explained to be "when any estate comes under the immediate management of the officers of Government, so that the rents are collected by them from the *ryots*, *joteiars*, dependent *talukdars*, *under-farmers*, or other description of under-tenants."

landholders by whom they are so employed, all the provisions of this Act, by which the personal appearance or attendance of parties to a suit is or may be required, shall be applicable to such *naibs*, *gomashtas*, or other persons; and anything which by this Act is required or permitted to be done by a party in person, may be done by any such person as aforesaid (*a*). Processes served on any such person shall be as effectual, for all purposes in relation to the suit, as if the same had been served on the landholder in person; and all the provisions of this Act, relative to the service of processes on a party to the suit, shall be applicable to the service of processes on such person." Under this Section, the *gomashta* may be plaintiff; the presentation by him is presentation by the plaintiff; and consequently he requires no power of attorney (*b*).

Suits by companies.—Plaints cannot be received when drawn simply in the name of the firm; but the names of the parties constituting the firm must be stated (*c*).

Exemption from attendance.—By Section 70, Act X, "a plaintiff or defendant shall not be required to attend in person if of the female sex, and of a rank or class which, according to the custom and manners of the country, would render it improper for her to appear in public." By Section 22, Act VIII, the Government may exempt certain persons of rank from personal attendance. When a *Raja*, who had been thus exempted, on being summoned to appear as a witness in a suit instituted by him under Act X, claimed exemption, and petitioned that the evidence of his general agent might be admitted instead, and the Deputy Collector dismissed the suit, the High Court ruled that his non-appearance was no ground for dismissing the suit, which should

(*a*) By English law, such an agent would not be allowed to delegate his power to another Sugden on Powers, 179.

(*b*) *Mujan Khan*, II C, 26th March, 1863

(*c*) *Polin Behari Sen*, II C, 31st January, 1868, F. B See Section 28, C C P, as to verification of plaints in cases of suits by companies.

have been decided upon the evidence tendered (*a*). If a person claims this privilege, and it is necessary, in consequence, to examine him by commission, he must pay the costs of the commission (*b*).

Mukhtars.—By Section 71, Act X, "Any party to a suit may employ an authorized agent or *mukhtar* to conduct the case on his behalf; but the appointment of such agent or *mukhtar* shall not excuse the personal attendance of the plaintiff or defendant in cases where his personal attendance is required by the summons or any order of the Court." A *mukhtarnama* under seal is as valid is a *mukhtarnama* under signature (*c*). The Board have ruled that a general power cannot give authority to appear in a rent suit (*d*). The scale of fees allowable to revenue agents is given in Section 14, Act XX, 1865. The limitation of Section 1, Clauses 9 and 10, Act XIV, 1859, is applicable to claims for recovery of such fees (*e*). Fees should be levied only on so much of a claim as has been decreed in plaintiff's favor (*f*).

Cost of process.—By Section 146, Act X, "Every process issued by a Collector under this Act shall be under the seal and signature of the Collector, and shall be served or executed by the *Nazir*, or by such other officer as the Collector may direct, at the cost of the party at whose instance it is issued. The amount of such cost, and, in the case of summons to a witness, any sum required for the travelling expenses of such witness, shall be deposited in Court before the process is issued. Provided that, if in any case the Collector is satisfied that a party is unable to pay the cost of any necessary process, he may direct such process to be served free of charge."

(*a*) *Jayat Indra Banwari*, H. C., 22nd January, 1863.

(*b*) *Pertab Chunder Sen*, H. C., 17th November, 1865, per Norman, J.

(*c*) *Burdwan Raja*, H C., 18th May, 1867.

(*d*) R. B., Chapter XI, Section 12, Clause 8.

(*e*) *Janoki Prasad*, N. W. P.

(*f*) *Man Singh*, N. W. P., 6th August, 1862.

Resistance of process.—By Section 147, "Any resistance or opposition to the lawful process of a Collector under this Act may be punished by the Collector, according to the provisions of the law for the time being in force for the punishment of resistance or opposition to the processes of the Courts of civil justice (*a*). When, in any such case, the offender is not present in Court, the Collector may summon him to answer to the charge; and, if after due service of the summons he fail to attend, may issue a warrant for his apprehension. Orders passed by Collectors under this Section shall not be deemed to be orders relating to the trial of suits, or to the execution of decrees within the meaning of Section 151." The usual procedure at present is to make cases of resistance of process over to the Magistrate, under Section 171, Code of Criminal Procedure, after making such preliminary enquiry as may be necessary. (*See* Section 16, Act XXIII, 1861). No private prosecutor is required (*b*). If the offence be a serious one, the Collector may commit the offender to the Sessions under Section 173, Code of Criminal Procedure (*c*). By Section 168, Code of Criminal Procedure, a charge of resistance of process falling within Chapter X, Penal Code, is not cognizable by a Criminal Court without the sanction of the Court concerned. But a Collector cannot sanction the

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(*a*) In a recent case, the High Court said they knew of no such law. —*Chota Sadha*, V. Wyman, Criminal Rulings, 19. Mr. Field says: "The law for the punishment of resistance or obstruction to civil process may be found in Sections 22-25, Regulation IV, 1793; Sections 24-27, Regulation VI, 1793, and Regulation IX, 1793, which have not been repealed; also Sections 226-230, and Section 268, Act VIII, 1859. There are, however, several offences which would fall under certain Sections of the Penal Code (Sections 173, 183, 184, 186), and as by Section 2, P. C., persons are liable under that Code, *and not otherwise*, for acts contrary to the provisions thereof, such offence should now be sent to a Magistrate to be dealt with."—Rent Law Procedure, p 142.

(*b*) *Mohesh Chunder*, H. C., 7th July, 1866.

(*c*) *Bansi Singh*, H C, 21st December, 1864.

institution of a criminal charge when the offence was committed before a Deputy Collector in a case appealable to the Judge (*a*). The preliminary enquiry may be *ex parte* (*b*). It seems that warrant cannot be issued under these Sections for the arrest of any person not before the Court (*c*). In a late case it was said that it is not discreet for a Collector to make over for trial to himself, as Magistrate, a charge of a contempt of the lawful authority of his own Court (*d*). A sanction given under Section 168 is not appealable, nor can any Court stay it (*e*). A charge should not be sent to a Magistrate unless a *primâ facie* case is made out (*f*).

Place of Court.—By Section 148, Act X, "It shall be competent to the Collector to hold a Court for hearing and determining suits under this Act in any place within the limits of his district or local jurisdiction. Provided that every hearing and decision shall be in open Court, and that the parties to the suit, or their authorized agents, shall have had due notice to attend at such place."

General Superintendence.—By Section 151, Act X, "In the performance of their duties under this Act, the Collectors and Deputy Collectors shall be subject to the general control of the Commissioner and the Board of Revenue, and the Deputy Collectors shall be subject to the control and direction of the Collectors to whom they are subordinate."

III.—Limitation of Suits.

By Section 30, Act X, "except as otherwise herein provided, all suits instituted under this Act shall be commenced within the period of one year from the date of the accruing of

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(*a*) *Mushraf Ali*, N. W. P., 4th November, 1862.
(*b*) *Chota Sadha*, H. C., 6th January, 1868.
(*c*) H. C. letter 1774 of 1863.
(*d*) H. C., 3rd February, 1868.
(*e*) *Ram Prasad Hujam*, H. C., 12th February, 1866, F. B.
(*f*) *Nawazish*, N. W. P., 1862, p. 318.

the cause of action.'" The limitations in the exceptional cases have been already given under the heads of Rent Suits, Suits against Agents, and Suits for *Pottahs* and *Kabuliyats*. The general law of limitation contained in Act XIV, 1859, does not supersede the special law of limitation contained in this Act (*a*). Hence the provisions of Section 14, Act XIV, 1859, in favor of a minor (*b*), or of a person who has *bonâ fide* prosecuted his suit in the wrong Court, do not apply to suits under Act X (*c*). A defendant pleading limitation must prove the facts upon which he bases his plea (*d*). Limitation cannot be pleaded in appeal, if not pleaded in the Court of First Instance (*e*). In another case it was said that if the law applicable to the case expressly bars jurisdiction in cases preferred beyond time, the Court must stay proceedings whenever it discovers the defect. If it is optional with the defendant to plead it, he must do so at once or not at all (*f*). A tenant derives his title from his landlord, and cannot therefore resist a suit by his landlord questioning that title by pleading limitation (*g*). When the lessor reserved to himself a right of re-entry, on failure to pay six consecutive *kists*, but did not sue on the first default, it was held the waiver of the first cause of action did not bar him from suing again on a second default being made, and that limitation was to be reckoned only from the date of the second default (*h*). Limitation does not

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(*a*) *J. Poulson*, H. C., 18th January, 1865, F. B.; *Nathu Nosya*, H. C., 17th September, 1864. The Agra Court have ruled otherwise.—*Syad Hussun Uskari*, N. W. P., 14th March, 1863, F. B.

(*b*) *Dinonath Panre*, H. C., 29th November, 1865.

(*c*) *Sodamini Dasya*, H. C., 19th July, 1864; *Purnima Chaudhrain*, 21st July, 1864; *Mudusudon Muzumdar*, 14th March, 1866.

(*d*) *Sristidar Muzumdar*, H. C., 24th September, 1864.

(*e*) *Collector of Rajshahye*, H. C., 26th January, 1864; *Advaitya Churan Rai*, 13th July, 1863.

(*f*) *Krishna Chunder Chattarjya*, H. C., 16th December, 1865.

(*g*) *Sristidar Muzumdar*, H. C., 24th September, 1864.

(*h*) *Meher Chand Saha*, H. C., 10th May, 1867.

apply to a suit for abatement, as that is a constantly recurring cause of action (*a*). The presentation of an unverified plaint does not save limitation (*b*). Plaintiff must prove when his cause of action arose (*c*).

IV.—Of a Suit till Final Decree.

Institution of Suits.—(See Sections 25—40, Code of Civil Procedure.) By Section 34, Act X, "suits under this Act shall be instituted by presenting to the Collector a plaint or statement of claim, which shall contain the name, description, and place of abode of the plaintiff; the name, description, and place of abode of the defendant, so far as they can be ascertained; the substance of the claim; and the date of the cause of action." No plaint can be legally presented on an authorized holiday, as a Court cannot legally sit on such holiday (*d*). A Judge cannot allow a supplementary plaint to be filed after an *Amin's* report has been given in (*e*). By Section 35, Act X, "the statement of claim shall be presented by the plaintiff, or by an authorized agent of the plaintiff who has personal knowledge of the facts of the case, or by an agent who shall be accompanied by a person who has such knowledge." The Board of Revenue have pointed out that the "authorized agent" is distinct from the *mukhtar* employed under Section 71 to conduct the case. The former requires no power of attorney, and is ordinarily identical with the *Naib* or *Gomashta* of Section 69, and his appearance excuses the absence of his principal, except under the circumstances mentioned in Sections 43 and 44. On the other hand, the *mukhtar* must be a revenue agent, enrolled under Act XX, 1865; he requires a special power of attorney, and his presence

(*a*) *Lucki Dass Mustafi*, H. C., 28th August, 1867; S. D., 1849, 188. But see *G. R. Barry*, H. C., 6th May, 1864; and VII. S. R., 209.

(*b*) *Abu Bibi*, H. C., 6th December, 1865.

(*c*) *Ram Narain Singh*, H. C., 10th November, 1865.

(*d*) *Sheogobind*, N. W. P., 16th January, 1864, F. B.

(*e*) *Chunder Sikar Deb Roykut*, I. W. R., 278.

does not excuse the absence of the principal (*a*). *Gomashtas* may present plaints, and require no power of attorney (*b*). The authorized agent need not be the plaintiff's general agent (*c*). By Section 36, Act X, "the statement of claim shall be subscribed and verified at the foot by the plaintiff or his agent in the manner following, or to the like effect: 'I, A. B., do declare that the above statement is true to the best of my knowledge and belief.'" If the statement shall contain any averment which the person making the verification shall know or believe to be false, or shall not know or believe to be true, such person shall be subject to punishment, according to the law for the time being in force for the punishment of giving or fabricating false evidence." The plaint must be verified by the plaintiff or his agent. Verification by a *mukhtar* is not sufficient. The circumstance that the plaintiff's deposition was taken cannot cure this defect (*d*). The principal is not liable to be indicted for perjury on account of a false statement made by his agent, unless it can be shown that he has abetted the offence (*e*). But the mere circumstance of the plaintiff having been absent from the Court when the statement was presented, will not excuse him (*f*). When the plaint was subscribed with the name of the plaintiff written by his *mukhtar*, and contained an averment that certain documents, upon the authenticity of which an adjudication in a previous suit had proceeded, were forged, this was not a false verification upon the face of it, as the Court might have acted upon documents which afterwards turned out

(*a*) R. B., Chapter XVI, Section 2.

(*b*) *Miahjan Khan*, H. C., 26th March, 1863, *Rama Nath Rai Chaudhari*, 4th August, 1863.

(*c*) *Jagat Indra Banwari*, H. C., 22nd July, 1863.

(*d*) *Srinath Dutt Chaudhari*, H. C., 18th June, 1866.

(*e*) *Tara Prasad Rai Chaudhari*, H. C., 12th August, 1862; see *Inder Chunder Bose*, 11th September, 1865.

(*f*) *Nawarish Ahmad*, N. W. P., 18th November, 1862; S D. Circular, 29th July, 1854.

to be forgeries, but the verification was irregular, as the signature or sign manual of the plaintiff was wanting (*a*). Also, it has been held that the institution of a second suit for arrears of rent, which had been found in a previous suit not to be due, does not *per se* justify a charge of perjury (*b*). An Appellate Court cannot reject an appeal on the ground of the non-verification of a statement admitted by the first Court (*c*).

Stamps.—By Section 37, suits under Act X were allowed to be instituted on stamps of one-fourth of the ordinary amount, but this was repealed by Act X, 1862. The stamp duty on petitions of plaint or appeal is now regulated by Act XXVI, 1867, Article 17, according to the value of the property in suit. If the value does not exceed Rs. 10, the stamp is Re. 1. If the value is between Rs. 10 and Rs. 100, the stamp is Re. 1 plus 8 as. per Rs. 5 or fraction of Rs. 5 of the difference between Rs. 10 and the value sued for. If between Rs. 100 and Rs. 1,000, Re. 1 per Rs. 10 or fraction of Rs. 10. If between Rs. 1,000 and Rs. 20,000, Rs. 100 plus Rs. 5 per Rs. 100 or fraction of Rs. 100 of the surplus value over Rs. 1,000. In suits for immoveable property, *khiragi* or *lakheraj*, the value is to be computed according to the market value. In suits for *khiragi* lands, eight times the *jumma* shall be taken as the market value when the settlement is temporary, and ten times the *jumma* when it is permanent (*d*). In suits for *lakheraj* lands, twenty times the annual net profits shall be taken as the market value, unless and until the contrary

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(*a*) *Roshan Jehan*, H. C., 9th September, 1862.

(*b*) *Tara Prasad Rai Chaudhari*, H. C., 12th August, 1862.

(*c*) *G. Clarke*, H. C., 17th September, 1864.

(*d*) These provisions evidently apply to cases in which the proprietary interest in *khiraji* land is the subject of the suit. Generally eight times the amount of the *jumma* would be far above the market value of a temporary *jote*. Ten times the annual net profits is a high value in the case of a permanent jote.

be proved—(note *a*). In suits for moveable property, other than money, the stamp duty shall be calculated according to the market value of the subject matter in suit, or, when the subject has no market value, (as for instance in the case of documents relating to title or for accounts) according to the amount at which the subject matter shall be estimated in the plaint. In suits in which it is impossible to estimate at a money value the subject matter of the suit, Rs. 10. In suits for money according to the amount claimed—(note *b*). In order to ascertain the market value or the annual net profits of any such property as is decribed in notes *a* or *b*, the Court may order a local enquiry, and either refund the excess duty, or stay the suit, until the deficiency has been paid according to the result. The Board of Revenue have ruled (*a*) that applications under Sections 25, 27, 28, Act X, and Sections 5 and 9, Act VI, require stamps as ordinary plaints Applications under Sections 13, 119, 149, Act X, and under Section 10, Act VI, require an 8 annas stamp (*b*). The value of the claim must always be stated at foot of the plaint. Article 11, Act XXVI, 1867, also provides that if the subject matter of any plaint, written statement, petition, or copy of decree or order, cannot be comprised in one stamp paper, additional pieces may be used bearing a stamp of the value required for petitions. By Section 32, Act X, 1862, questions regarding valuation are to be decided by the Court in which the petition of plaint or appeal is filed, subject to any appeal to which the orders of such Court are open.

Section 41, Act X, and Section 12, Act VI, provide special form of plaints for rent and ejectment suits, which have already been given in the chapters relating to those suits. By Section 42, Act X. "If the statement of claim do not contain the several

(*a*) R B, Rent Laws, Chapter XVI, Section 1.

(*b*) When the plaintiff, in a suit for measurement under Section 9, valued his suit at Rs. 3,000, the proper stamp under the old law was Rs 100.—*Omachurn Biswas*, H. C, 6th June, 1867.

particulars hereinbefore required to be specified therein, or be not subscribed and verified as hereinbefore required, the Collector may return the statement to the plaintiff, or at his discretion may allow it to be amended." Section 29, Act VIII, gives a further power of rejecting a plaint for prolixity; and Sections 30, 31, 32, and 33 of that Act allow plaints to be rejected if the claim is beyond the jurisdiction; if the claim be insufficiently valued; if the plaintiff have no cause of action; or if the cause of action be barred by limitation: but these Sections have not been extended to suits under Act X. The Courts have a general power to amend plaints, in cases where justice requires such amendment, at any time during the progress of the case (*a*). But a plaint should not be altered so as to change the entire nature of the suit (*b*). In one case, Sir B. Peacock, C.J., said:—"It is a general rule that a plaintiff must prove his case as laid in his plaint or written statement; if there is a variance between his statement and his proofs, arising from inadvertence or mistake, the Court may allow the issues to be amended, but that is entirely at the discretion of the Court. We think that it would not be the exercise of a sound discretion to allow a party who relies upon a document to set up a fresh case, where an issue as to the execution of such document is found against him, and there are good grounds for believing the document to be a forgery (*c*). The Court may strike out the names of parties improperly introduced (*d*).

(*a*) *Hira Mani Debya*, II. W. R., 237.

(*b*) *Govind Mahapotra*, H. C., 10th September, 1866.

(*c*) *Naraim Dasya*, H. C., 12th August, 1862; see *Shaikh Titu*, 4th August, 1862; *Simru Karigur*, 8th August, 1862; *Fatima Bibi*, 23rd January, 1863. As to the presumption against a party filing evidence fabricated in some material point, see *Garibulla Gazi*, H. C., 29th March, 1865; *Bengal Indigo Co.*, 1st August, 1865; *Khub Kunwer*, P. C., 21st December, 1861; *Surnamayi*, P C., 23rd July, 1864.

(*d*) *Bhyrab Chunder Dass*, I. Hyde, 281.

But after the hearing, the names of parties not originally sued should not be added, nor should they be summoned (*a*). The Madras Court has held that, whenever a plaint is allowed to be amended, a time should be fixed, and the plaint rejected if not amended within such time (*b*). But the Agra Court has held that it is wrong to fix a time (*c*). The fact of a period having been granted for the amendment of the plaint, does not alter the period of limitation (*d*). Section 36, Act VIII, gives an appeal from an order rejecting a plaint.

Documents.—By Section 38, Act X: "If the plaintiff rely in support of his claim on any document in his possession, he shall deliver the same to the Collector at the time of presenting his statement of claim. Unless such document be delivered in, or its non-production be sufficiently excused, or unless the Collector see fit to extend the time for producing the same, it shall not afterwards be admitted." The documents referred to in this Section are not documents filed only as collateral evidence; such should be received at any time (*e*). The neglect to file with the plaint the document which is the basis of the claim does not necessitate the dismissal of the suit, if it can proceed without it (*f*). When the Court of first instance, in the exercise of its discretion, admits a document not filed with the plaint, the evidence cannot be rejected by the Appellate Court (*g*). Under Section 355, Act VIII, such documents may be received even in

(*a*) *Pran Mandal Mulla*, H. C., 28th November, 1864.

(*b*) *Ismail Sahib*, 1st October, 1860, I. Madras H. C. Reports, 427.

(*c*) *Hurscwuk Shukul*, N. W. P., 13th January, 1864.

(*d*) *Ismail Sahib*, I. Madras H. C., 427.

(*e*) *Bangsi Lall*, H. C., 3rd December, 1864. But on the original side of the High Court it has been held that this Section refers to all documents.—*Premsook*, I. Hyde, 145. The contrary view was taken in *Kamini Dasya*, I. Bourke, 91.

(*f*) *Umarath Debya*, H. C., 16th January, 1864.

(*g*) *Sukh Lall Jewari*, H. C., 16th July, 1864; *Joy Chunder Surma*, 2nd March, 1864.

appeal (*a*). Section 39, Act VIII, allows copies to be filed in certain cases. Insufficiently stamped deeds may be received under Clause 1, Section 17, Act X, 1862, on payment into Court of the proper amount of stamp duty, to be determined by the Court, whose decision is final; the document need not be sent to be stamped before the civil decision (*b*). The Court will keep a register of the penalties levied.

By Section 39, Act X: "If the plaintiff require the production of any document in the possession or power of the defendant, he may, at the time of presenting his statement of claim, deliver to the Collector a description of the documents in order that the defendant may be required to produce the same." This Section, being only permissive, will not preclude the plaintiff from serving the defendant with notice to produce the document at a later period (*c*).

Of summoning the defendant.—(Sections 41-46, Code of Civil Procedure.) By Section 43, Act X: "If the statement of claim be in proper form, the Collector, except as otherwise hereinafter specially provided, shall direct the issue of a summons to the defendant, and if the plaintiff require the personal attendance of the defendant, and satisfy the Collector that such personal attendance is necessary, or the Collector of his own accord require such personal attendance, the summons shall contain an order for the defendant to appear personally on a day to be specified in the summons; otherwise the summons shall order the defendant to appear personally, or by an agent duly authorized in his behalf, who has personal knowledge of the subject, or who shall be accompanied by a person who has such personal knowledge (*d*). By Section 41, Code of Civil Procedure, the summons may be either for the statement of issues or for the final

(*a*) *Gunesho Lall*, N. W. P., 25th November, 1861.
(*b*) *Bhugwan Dass*, N. W. P., 16th July, 1864.
(*c*) S. D. Circular, 29th July, 1859.
(*d*) *Inayat Hosain*, H. C., 6th February, 1868.

hearing. But this is not applicable to Act X suits. Under Act X, it is altogether within the discretion of the parties whether they shall produce their witnesses at the first hearing (*a*). It has been ruled that "parties should be summoned in person in those cases only where it seems certain that they must have a better personal knowledge of the facts than any one else. To summon a *zamindar* in many of the disputes which arise between himself and his *ryots* would, in general, be a vexatious proceeding, because men of this class usually conduct their affairs through the agency of others, and would therefore be unable to give direct testimony; but, in cases where the question is whether the defendant personally executed a certain deed, or made the contract which the suit seeks to enforce, the interests of justice clearly require that the party himself should be brought into Court" (*b*). Section 42, Code of Civil Procedure, provides that if the Court see fit to require the personal attendance of the plaintiff or defendant, it shall make an order for such attendance. But "no plaintiff or defendant shall be ordered to attend in person who at the time is *bonâ fide* residing at a distance of more than fifty miles from the place where the Court is held, unless he be resident within the limits of the jurisdiction of the Court." This provision has been held to apply to Act X suits (*c*). But it has been held not to apply to parties summoned as witnesses by the Court of its own accord under Section 166, Code of Civil Procedure, which latter Section is subject only to the 100 miles limitation laid down in Section 175, Code of Civil Procedure (*d*). By Section 44, Act X, "The day to be specified in the summons shall be fixed

(*a*) The Board have ruled (Rent Laws, Chapter XVI, Section 2) that this "authorized agent" requires no power of attorney, but the question occurs how is he to be "authorized?"

(*b*) S. D., Circular, 29th July, 1859.

(*c*) *Sheikh Gholam Ahya*, H. C., 15th August, 1865.

(*d*) *Tej Pal Singh*, N. W. P., 153.

with reference to the state of the file, and the distance the defendant may be, or be supposed to be, at the time from the place where the Court is held (*a*), and the summons shall order the defendant to produce any document which he may have in his possession of which the plaintiff demands inspection (*b*), or upon which the defendant may intend to rely in support of his defence. It shall also enjoin him to bring with him his witnesses, if they are willing to attend without issue of process, and shall be in the form A contained in the Schedule to this Act, or to the like effect." Parties may also be summoned to produce documents under Section 153, Code of Civil Procedure, and those failing to produce them may be dealt with under Section 170.

Service of summons—(Sections 47-66, Code of Civil Procedure). By Section 45, Act X, "The summons shall be served by delivering a copy of the summons to the defendant personally, when practicable; or, if the summons cannot be served on the defendant personally, by affixing a copy of it to some conspicuous part of his usual place of abode, and also affixing a copy of the same in the Collector's office." Section 53, Code of Civil Procedure, allows service of summons to be made on any adult male member of the defendant's family residing with him, if the defendant cannot be found. By Section 46, Act X, "If the summons be served personally, the *nazir* shall endorse on the

(*a*) A case in which due time was not allowed was remanded.—*Lokenath Thakur*, II. C., 3rd March, 1866.

(*b*) The documents of which a plaintiff may claim inspection are limited by the Evidence Acts. Section 19, Act XIX, 1853, protects the title deeds of a witness not a party to the suit, unless he shall have agreed in writing to produce them. Section 21, Act II, 1855, protects all documents of State, the production of which would be contrary to good policy, and all documents held for others who would not be bound to produce them if in their own possession. Section 22, Act II, 1855, protects all documents belonging to parties to the suit which are not relevant to the case, and all confidential correspondence between them and their legal professional advisers, unless they volunteer to give evidence. See Norton, p. 333.

summons the fact of such service. If personal service be not effected, the *nazir* shall endorse on the summons the reason of not serving it personally, and how it has been served." By Section 47, "If the usual place of abode of the defendant be in another district, the summons, together with the cost of the service thereof, shall be sent by the public post to the Collector of such district, who shall issue the summons and return the same after service, with the prescribed endorsement, to the officer by whom it was transmitted to him." If the defendant be resident in Calcutta, the summons, under Act XXII, 1840, is forwarded to the Deputy Sheriff, with the request that after obtaining the endorsement of one of the Judges of the High Court, he will proceed with the execution of the process. The fees and an English translation must accompany it, and a person on the part of the plaintiff must attend at the Deputy Sheriff's office (*a*). Section 62, Code of Civil Procedure, allows service to be made on Government servants through the head of the office to which they belong. And Section 64 allows a letter to be substituted for a summons. By Section 48, Act X, "The amount of the cost of serving the summons, or, if a warrant be issued, as provided in the next succeeding Section, of serving the warrant, shall in all cases be deposited in Court upon the same day, or the day next following that on which the plaint or statement of claim is presented to the Collector. If the said amount be not so deposited, (except in cases in which the Collector may allow the issue of summons free of cost, under the discretion reserved to him in Section 146), the case shall not be brought on the file of suits. But in such case the plaintiff may present another plaint at any time within the period allowed for the limitation of actions."

Arrest before judgment—(Sections 74-80, Code of Civil Procedure). By Section 49, Act X, "If in any suit against any under-tenant or *ryot* for the recovery of an arrear of rent, or against an

(*a*) Board's Rules, Chapter XII, Section 8.

agent for the recovery of any money, papers, or accounts, the plaintiff desire a warrant of arrest to be issued against the defendant, such defendant being resident within the district in which the suit is instituted, he shall present with his statement of claim an application (*a*) for the issue of such warrant. When such application is presented, the Collector shall examine the plaintiff or his agent on his oath or affirmation, or otherwise, according to the law for the time being in force in relation to the examination of witnesses, and inspect the documents adduced by him in support of his claim; and if there be *primâ facie* grounds for believing the claim to be well founded, and that, if a summons be issued, the defendant will abscond instead of appearing to answer the claim, the Collector may issue a warrant for the arrest of the defendant. The Collector shall fix a reasonable time for the return of the warrant (which shall be in the form (B) contained in the Schedule to this Act, or to the like effect), and the officer entrusted with the service of the warrant shall, at the time of arresting the defendant, deliver him a notice addressed to the defendant, (which shall be in the form (C) in the Schedule, or to the like effect,) containing the particulars of the claim, and requiring the defendant, if he contest the claim, to bring with him any document upon which he may intend to rely in support of his defence. But no such warrant shall be issued in a suit for arrears of rent due in respect of a dependent *taluk*, or other transferable tenure, which, as hereinafter provided, is liable to sale in execution of any decree which may be passed in the case." By Section 50, Act X, "If a defendant be arrested under the warrant of arrest, he shall be brought with all convenient speed before the Collector, and the Collector shall commit him to custody, unless he deposits in Court such sum as may be specified in the notice." By Section 51, "When a defendant is brought before the Collector under warrant, the

(*a*) On a stamp of 1 or 8 annas, according as the valuation of the suit is over or under Rs. 50.

Collector shall, with all convenient speed, proceed to try the case in the manner hereinafter provided; and if the suit cannot be at once adjudicated, the Collector may, if he think fit, require the defendant to give security for his appearance whenever the same may be required, at any time whilst the suit is depending, or until execution of the final decree which may be passed thereon, and may commit the defendant to the Civil Jail, to be there detained until he shall furnish such security, or deposit such sum as the Collector shall order. The security bond shall be in the form (D) contained in the Schedule to this Act, or to the like effect," and on an eight *anna* stamp (*a*). By Section 53, Act X, "If it shall appear to the Collector that the arrest of the defendant was applied for without reasonable cause, the Collector may in the decree award to the defendant such sum, not exceeding Rs. 100, as he may deem a reasonable compensation for any injury or loss which the defendant may have sustained by reason of such arrest, or of his detention in jail during the pendency of the suit." By Section 52, Act X, "If the defendant cannot be arrested under the warrant, the Collector, on the application (*b*) of the plaintiff, shall either postpone the case for such period as he may think proper, in order that the plaintiff may apply within the said period for another warrant to be issued for the arrest of the defendant, or shall forthwith issue a proclamation (*c*) to be a fixed in his own office and at the residence of the defendant, fixing a day for the hearing of the case, which shall not be less than ten days from the date of the publication of the notice at the residence of the defendant. If the defendant shall appear in pursuance of the proclamation, he shall be dealt with as provided in the last preceding Section."

(*a*) Board's Rules, Chapter XVI, Section 1, Clause 11.

(*b*) On a one *anna* or an eight *anna* stamp, according as the subject matter of the suit is over or under 50 Rs.—Board's Rules, Chapter XVI, Section 1, Clause 4.

(*c*) In form (H.), Board's Rules, Chapter XVI, Section 11, Clause 8.

Attachment before judgment.—By Section 16, Act VI, 1862, B.C., Sections 81-90, Code of Civil Procedure, are extended to suits under Act X. By Section 81, if the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property, or remove it from the jurisdiction, the plaintiff may apply to the Court to call on the defendant to furnish security to fulfil any decree that may be passed against him; and on his failing to do so, to direct that his property shall be attached. The Agra Court has ruled that the property in litigation cannot be attached under this Section, but under Section 92 (*a*). By Section 82, Code of Civil Procedure, the application shall specify the property and its value, and the plaintiff shall declare the defendant is about to dispose of it with such intent as aforesaid. By Section 83, if the Court, after examination of the applicant and enquiry, shall be satisfied of the correctness of his allegations, the Court shall issue a warrant to the *Nazir*, directing him to call on the defendant, within a time to be fixed by the Court, either to furnish security to produce the property when required, or else to show cause why he should not furnish security. The Court may also in the warrant direct the attachment until further order of the property. By Section 84, if cause be not shown, or security be not furnished, the property may be attached; and if cause be shown, or security be furnished, the attachment may be withdrawn. By Section 85, the attachment shall be made under the rule for attachment in execution of decrees; orders for attachment shall be open to appeal. By Section 86, claims to attached property shall be investigated like claims to property attached in execution. By Section 87, the attachment may be removed on the defendant furnishing security as above required, and for the costs of the attachment. By Section 88, "If it shall appear that the attachment was applied for on insufficient grounds, or if

(*a*) *Razeea Begum*, N. W. P., 1863, 301.

the suit of the plaintiff is dismissed, or judgment is given against him by default, or otherwise, and it shall appear to the Court that there was no probable ground for instituting the suit, the Court may, on the application of the defendant, award against the plaintiff, in its decree, such amount, not exceeding the sum of Rs. 1,000, as it may deem a reasonable compensation to the defendant for the expense or injury occasioned by the attachment of his property: provided that the Court shall not award a larger amount of compensation under this Section than it is competent to such Court to decree in an action for damages. An award of compensation under this Section shall bar any suit for damages in respect of such attachment." There is no appeal from an order awarding compensation (*a*). Compensation may be awarded notwithstanding that the plaintiff may be partly successful (*b*). By Section 89, "Attachment before judgment shall not affect the rights of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." By Section 90, the Court may stay the sale of property already under attachment when execution of a decree fraudulently obtained is applied for (*c*).

Of the withdrawal of suits.—By Section 97, Code of Civil Procedure, the Court may allow a plaintiff to withdraw from a suit, with liberty to bring a fresh suit, within the period of limitation, and if the plaintiff withdraw without such permission, he shall be precluded from bringing a fresh suit. But it has been held that this Section is not applicable to suits under Act X (*d*). A suit withdrawn without permission may be instituted afresh (*e*). A withdrawal is no bar to a fresh suit for the

(*a*) *Hara Sundari Dasya*, III., W. R., *Misc.*, 28.
(*b*) *Muhammad Razeudhin*, H. C., 3rd July, 1866.
(*c*) See S. D. Circular, 2nd February, 1849.
(*d*) *Dyal Chunder Ghose*, H. C., 16th September, 1862.
(*e*) *Madhu Sudun Mullick*, H. C., 27th March, 1867.

same cause (*a*). Under Section 37, Act XXIII, 1861, the Appellate Court may apparently allow a withdrawal (*b*). No appeal lies against an order allowing a plaintiff to withdraw a suit (*c*).

Compromise.—By Section 98, Code of Civil Procedure, if the suit be adjusted or compromised, such agreement shall be recorded, and the suit disposed of accordingly; and in such case the Court may grant a certificate for the refund of the stamp duty on the plaint; provided the agreement be such as not to require a decree to pass, on which process of execution can be taken out. This rule is repeated with a slight modification in Section 26 of the Stamp Act. It is not clear whether this is applicable to suits under Act X. The Madras Court has held that the provision regarding refund of stamp duty is not applicable to appeals (*d*). When a Collector, understanding that the parties had come to a settlement, struck off the case without giving a final judgment, and afterwards found that the parties had never intended that the case should drop, it was held that he had the power of restoring the case to the file (*e*).

Of the death of parties.—By Section 99, Code of Civil Procedure, the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survive. And with regard to Act X suits, it has been ruled that the death of one of the parties does not abate the suit, unless the case is in any way prejudiced thereby (*f*). By Sections 100-104, Code of Civil Procedure, the Court may on application substitute the representative of the deceased party in his room, and, in case of dispute, may stay the suit, or decide who is to be substituted. If no application be made, the Court shall pass an order that

(*a*) S. D., 1858, 469.

(*b*) But See *Gobind Chunder Pal Chaudhri*, II., W. R., 247.

(*c*) *Raj Kissen Rai*, H. C., 19th July, 1866.

(*d*) 13th March, 1860.

(*e*) *Dindyal Poramanik*, H. C., 15th February, 1868.

(*f*) *Jaga Mohan Singh*, H. C., 13th April, 1864.

the suit shall abate. When a plaintiff dies, the usual mode is to publish a proclamation at his house. The right of maintaining most actions survives in general to or against the executors or administrators of the original parties. The only exceptions are in the case of suits which are founded on certain violations of *personal* right. By the English common law, all actions for torts "die with the person." But by several Statutes, exceptions have been made in cases of trespass to the goods and injury to the person (*a*). Probably all causes of action under Act X would be held to survive to the representative.

Of notices to produce.—By Sections 107, 8, Code of Civil Procedure, when the parties require the production of documents, which have not been called for at the time of the issue of the summons, they shall deliver to the Court two notices in writing, one for service as a summons on a defendant, and one for record.

Of the appearance of the parties, and consequences of non-appearance.—(Sections 109-119 Code of Civil Procedure.) By Section 54, Act X, "If, on the day fixed by the summons or proclamation for the appearance of the defendant, or on any subsequent day to which the hearing of the case may be adjourned, prior to the recording of an issue for trial as hereinafter provided, neither of the parties appear in person or by an agent, the case shall be struck off, with liberty to the plaintiff to bring a fresh suit, unless precluded by the rules for the limitation of actions." By Section 55, "If, on any such day, the defendant appear, the Collector shall pass judgment against the plaintiff by default, unless the defendant admit the cause of action, in which case the Collector shall proceed to give judgment for the plaintiff upon such admission, without costs (*b*):

(*a*) III, Stephen's Blackstone, 483.

(*b*) If the defendant admit the claim, decree must pass against him. S. D., 1851, 286.

provided that such judgment, if there be more than one defendant, shall be only against the defendant who makes the admission." When the defendant admits the claim, it should be decreed to the extent admitted, notwithstanding the plaintiff's default (*a*). By Section 56, "If on any such day the plaintiff only appears, the Collector, upon proof that the summons or proclamation has been duly served according to the provisions of this Act, shall proceed to examine the plaintiff or his agent, and after considering the allegations of the plaintiff, and any documentary or oral evidence adduced by him, may either dismiss the case or postpone the hearing of it to a future day for the attendance of any witness the plaintiff may wish to call, or may pass judgment *ex parte* against the defendant. It will be observed that, even though the defendant does not appear, the plaintiff must prove his case before he can obtain a decree (*b*). The Board have ruled that caution is to be exercised in deciding suits *ex parte* on days when the Civil Courts are closed. The presentation by the defendant of a petition of adjournment through a *mookhtar* is no appearance, such as will bar an *ex parte* judgment (*c*). But an appearance in person or by an agent, without putting in any answer or written statement, is an appearance within this Section (*d*). By Section 57, Act X, "If the defendant appear on any subsequent day to which the hearing of the suit may be postponed, under the last preceding section, the Collector may, before such conditions, if any, as to costs or otherwise, as he may think proper, allow the defendant to be heard in answer to the suit as if he had appeared on the day fixed for his attendance." Sections 112-113, Code of Civil Procedure, provided that if the plaintiff only appear, and it be found that summons was not served, or not served in time to allow defendant to

(*a*) *Lekraj Rai*, H C, 18th April, 1866.
(*b*) S D., Circular, 29th July, 1859.
(*c*) *Rup Narain Singh*, H. C., 24th June, 1863.
(*d*) *Golukbur*, H. C., 30th July, 1862.

appear, a second summons may be issued, or the case may be adjourned, and notice given to the defendant. Section 115, Code of Civil Procedure, provides that when there are several plaintiffs or defendants, each may by a written authority empower the other to appear for him. Section 116, Code of Civil Procedure, provides that if some of the plaintiffs or defendants fail to appear, the Court may proceed with the suit, and pass such order with regard to the parties failing to appear as may be just and proper. Section 117, Code of Civil Procedure, provides that a party summoned to appear in person under Section 42, and failing to do so, shall be dealt with under the above Sections, unless he shows sufficient cause for failing to appear, which, by Section 118, may be done by a declaration signed and verified like a plaint, and on unstamped paper.

By Section 58, Act X, "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance. But in all such cases, if the party against whom judgment has been given shall appear either in person or by agent, (if a plaintiff, within fifteen days from the date of the Collector's order, and if a defendant, within fifteen days after any process for enforcing the judgment has been executed, or at any earlier period,) and shall show good and sufficient cause for his previous non-appearance, and shall satisfy the Collector that there has been a failure of justice, the Collector may, upon such terms or conditions as to costs or otherwise as he may think proper, revive the suit and alter or rescind the decree, according to the justice of the case. But no decree shall be reversed or altered without previously summoning the adverse party to appear and be heard in support of it." By Section 119, Code of Civil Procedure, the procedure in the Civil Courts in such case is to "pass an order for setting aside the judgment, and to appoint a day for proceeding with the suit." By Section 13, Act VI, 1862, B. C., "in all cases in which the Collector shall pass an order under Section 58, Act X for setting

aside a judgment, the order shall be final; but in all appealable cases in which the Collector shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable; provided that the appeal be preferred within the time allowed for an appeal from such final decision, and be written on stamp paper of the value prescribed for petitions to the Court to which the appeal lies, where a stamp is required for petitions." The order of a Deputy Collector admitting a revival under Section 58, is final (*a*); but only if it be passed legally and with jurisdiction (*b*). The revival will only affect the rights of the applicant, and not those of other defendants who have not applied for a revival (*c*). When a tenure is sold in execution under Section 105, this sale is the "execution of the process" from which the fifteen days are to be counted (*d*). In another case, it was said, the fifteen days must be counted from the date on which such proceedings in execution of the decree take place, as must necessarily bring the decree to the defendant's notice, *e. g.*, attachment of person or property (*e*). And this ruling has now been confirmed by a Full Bench (*f*). When an *ex parte* decree under Clause 5, Section 23, was executed under Section 82, without the appearance of the defendant, it was held, the fifteen days must be counted from date of giving possession (*g*). No second application to revive an *ex parte* case can be received (*h*). A defendant who appeared

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(*a*) *Kishta Nath Biswas*, II. C., 22nd February, 1864.

(*b*) *Kanhai Dass*, II. C., 28th August, 1866; *Radha Binode Chowdhari*, II. C., 12th December, 1866; *e. g.*, if the application was made after time, *Radha Binode Chowdhari*, VI, W. R., 300.

(*c*) *Durga Prasad Ghose*, II. C., 26th November, 1864.

(*d*) *Jotendar Mohan Thakur*, II. C., 3rd May, 1864.

(*e*) *Baidya Nath Rai*, II. C., 12th January, 1865.

(*f*) *Radha Binode Chowdhari*, II. C., 3rd February, 1868, F. B.

(*g*) *Pitam Singh*, N. W. P., 10th October, 1863.

(*h*) *Sadaudin*, II. C., 20th June, 1867.

at a first hearing, but who was absent from an adjourned hearing, and against whom an *ex parte* decree was passed, can appeal (*a*). The mere circumstance of an appeal having been preferred by the plaintiff, and an *ex parte* judgment thereon upheld, does not debar the defendant from applying for retrial. A successor may revive a suit decreed *ex parte* by his predecessor (*b*). When defendant claimed a certain class of deductions from his rent, which plaintiff admitted, and the plaintiff being summoned under Section 60, failed to appear, it was held that his default did not prevent him from appealing, as the prohibition to hear appeals against judgments by default applies only to cases of dismissal made before issues are fixed, and not to orders passed after evidence has been put in on both sides (*c*).

Of the Examination of the parties.—(Sections 125-127, Code of Civil Procedure) By Section 59, Act X, "when both parties appear in person or by agent on the day named in the summons, or upon any subsequent day to which the hearing of the case may be adjourned (for sufficient reason to be recorded by the Collector), the Collector shall proceed to examine such of the parties as may be present, and either party or his agent may cross-examine the other. If either of the parties be not bound to attend personally, any agent by whom he shall appear, or any person who shall accompany such agent shall be examined and cross-examined in like manner as the party himself would have been, if he had attended personally." By Section 60, "the examination of the parties or their agents, or such other persons as aforesaid, shall be upon oath or affirmation or otherwise according to the law for the time being in force relative to the examination of witnesses. The substance of the examination shall be reduced to writing in

(*a*) *Kali Churn Dutt*, VI, W. R., 86.
(*b*) *Lallgi Mal*, II C., 8th June, 1866.
(*c*) *Lekraj Rai*, II C., 18th April, 1866 See Section 68.

the vernacular language of the Collector, and filed with the record." A petition to correct the deposition of an agent should be received with the greatest caution (*a*). When either party relies on the other's statement on oath, he cannot afterwards object to a decree founded on such statement, as by this means the case is, as it were, taken out of the hands of the Court; any further proceedings, in the shape of appeal, application for review, or charge of perjury, are precluded (*b*). But if in such a case other evidence has been subsequently admitted, the case cannot be disposed of merely upon the deposition relied on, and without considering the other evidence (*c*). By Section 64, Act X, "if, on such examination as aforesaid, the agent of either party be unable to answer any *material* question relating to the case, which the Collector is of opinion that the party whom he represents ought to answer, and is likely to be able to answer, if interrogated in person, the Collector may postpone the hearing of the case to a future day, and direct that the party whose agent may have been unable to answer as aforesaid, shall attend in person on such day; and if the party so directed to attend shall fail to appear in person on the day appointed, the Collector may pass judgment as in case of default, or make such other order as he may deem proper in the circumstances of the case" (*d*). A case cannot be dismissed at this stage for want of knowledge in the agent, without first summoning the principal (*e*). A plaintiff whose suit has been dismissed under this Section for default, can only revive it in the manner prescribed in Section

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(*a*) *Ram Naraian Singh*, H. C., 14th June, 1864.

(*b*) *Nawazish Ahmud*, N. W. P., 18th November, 1862; *Musst Chota*, 30th August, 1864; *Beejhai Raja Gonesh*, S. D., 29th August, 1843.

(*c*) *Shaikh Abdul Rahman*, H. C., 9th August, 1866.

(*d*) Sections 161-166, C. C. P., contain further provisions for the summoning of parties at the instance of the opposite side.

(*e*) *Lekraj Rai*, H. C., 19th April, 1864.

58, and cannot bring a fresh suit under Section 54 (*a*). The question to answer which a party is summoned under this Section must be a material one, and it should be recorded (*b*). Section 126, Code of Civil Procedure, provides that if a party refuses to answer a question, judgment may be given against him. Parties should not be summoned in person when they have no personal knowledge of the points to be adjudicated, or when they have admitted by petition or otherwise the points at issue (*c*).

Of written statements.—By Section 59, Act X, "At the time of examination the defendant, if he think fit, may file a written statement of his defence." This need not be verified (*d*). The statement must be written on a one *anna* or eight *anna* stamp, according as the suit is for an amount under or over Rs. 50 (*e*). Sections 120-124, Code of Civil Procedure, lay down certain rules as to written statements; *viz.*, that they must be presented at the first hearing; that particulars of any set-off claimed must be entered in them; that they must not be prolix or argumentative; and that the Court may reject them if prolix, argumentative, or irrelevant. Written statements should be full and true narratives of the facts, full enough to dispense with the necessity for examining witnesses at the settlement of issues (*f*). An equitable defence may be set up at the trial, though not put forward in the written statement (*g*). It is not imperative on the defendant, in an Act X suit, to put in a written statement (*h*). A written statement is not of the

(*a*) *Amanulla*, N. W. P., 31st January, 1863.

(*b*) S. D, Circular, 29th July, 1859.

(*c*) *Lekraj Rai*, 18th April, 1866. In this case it was said there is an appeal from orders enjoining the attendance of parties under this Section.

(*d*) *G. Clarke*, II C., 17th September, 1864.

(*e*) Board's Rules, Chapter XVI, Section 1, Clause 4.

(*f*) *Sumath Mullik*, I, Hyde, 30; *Anund Chun Banerjya*, I, Hyde, 147.

(*g*) *Gour Chunder Biswas*, VII, W. R, 120.

(*h*) *Dhanput Singh*, P. C., 20th December, 1867.

nature of an English plea "in confession and avoidance," wherein the confession is considered as an admission, and the avoidance has to be proved. The statement of a party, if it is used as evidence against him, must be taken altogether, and not in part (*a*). In this case, which was a rent suit, the defendant admitted the quantity of land, but denied the rate; and it was urged that the *onus* was upon him to prove by evidence that he paid enough to cover the rent. But the Court said, "the defendant, at the same time that he admitted the holding, stated the rate at which he held, and that he had paid Rs. 231 on account of the rent. If the defendant's statement be true, he paid enough to cover his rent; and we see no reason for disbelieving the statement. If the plaintiff uses it as evidence against the defendant, he must take the whole admission together. * * * If the statement of one party is used as evidence against him by the other, the Judge is not necessarily bound to believe the whole statement. He may believe one part of it, and disbelieve the other part. But he ought not to do so without some good reason. There was nothing in the defendant's admission, taken as a whole, which threw on him the *onus* of proof." So, in a recent suit for enhancement on the ground of increased productiveness of the land not due to the agency of the *ryot*, in which the *ryot* admitted the productiveness had increased, but not otherwise than by his agency, the Chief Justice said, "a written statement is not a plea by way of confession and avoidance; it is a statement of the grounds of the defence. It is like an answer in Chancery. If you read a man's answer, you must take his whole admission together. Taking the whole admission together in this case, the defendant says that the productiveness has increased, but not otherwise than by my agency;" and the plaintiff has then to prove his case" (*b*). In this case this involved proving a negative,

(*a*) *Lalla Probha Dass*, H. C., 14th March, 1864.

(*b*) *Polin Behari Sen*, H. C., 31st January, 1868, F. B.

and in regard to this the Chief Justice quoted Starkie:—"It is to be carefully remarked that, although, as a general rule, the law neither presumes liability nor discharges from liability, nor any fact or state of things essential to such liability or discharge not established by competent means, the law does not, in the absence of proof of a negative, where it is material to a right, assume the affirmative to be true, it is on the contrary frequently essential to the establishment of rights to prove the negative of facts" (*a*). In an English case, it was said—"The proof may be difficult where the matter is peculiarly within the defendant's knowledge, but that does not vary the rule of law."

With regard to admissions in written statements it was said in one case by the Privy Council—"Their Lordships cannot apply to the pleadings in these Courts the strict rule that averments not traversed must be taken to be admitted; and they are not prepared to say that the answer contains an admission which even as between the plaintiff and *Hari Mani* would have dispensed with the necessity of proving the instrument (*b*)."

Of the production of documents.—(Sections 128-138, Code of Civil Procedure.) Section 60, Act X, provides that, "If the defendant rely on any document in support of his defence, he shall deliver the same into Court at the first hearing of the suit, and unless such document be so delivered in, or its non-production be sufficiently excused, or unless the Collector see fit to extend the time for producing the same, it shall not afterwards be admitted." Sections 128-138, Code of Civil Procedure, provide that all documentary evidence shall be produced at the first hearing; that all exhibits shall be received and inspected by the Court; and those irrelevant or inadmissible rejected, the reasons being recorded; that documents

(*a*) Starkie on Evidence, p. 588. See *Muhammad Gauhur Ali Khan*, H. C., II, W. R, 13.

(*b*) *Anand Mayi Choudkrani*, P. C., II, W. R., 19. See Macpherson, Civil Procedure, 305.

insufficiently stamped may be received on payment of deficient duty and penalty; that an account of monies so received shall be kept and a monthly return sent to the Collector (*a*); that admitted exhibits are to be endorsed and filed; that rejected exhibits shall be endorsed, marked "rejected," and returned, unless impounded by the Court on suspicion of forgery; that after the time allowed for appeal has elapsed, the admitted exhibits may be returned unless impounded; that, for special reasons, exhibits may be returned before the time limited, certified copies being kept; that receipts are to be taken in a book for returned exhibits; and that Courts may send for papers from their own records, or from other public offices or Courts (*b*). Section 133 provided that no stamp duty should be required in respect of the production or filing of exhibits; but this Section was repealed by Section 4, Act XXVI, 1867, and by Article 10 of that Act it is now only the first application in respect of the production or filing of any exhibit which is exempted from stamp. The High Court has recently called attention to these provisions. The most frequent violations of the rule against the admission of irrelevant or inadmissible evidence are found to be the admission of decisions and proceedings *inter alios* (*c*), and the production of copies or offering secondary evidence of the contents of documents when the originals ought to be produced or their absence accounted for (*d*). No unregistered lease for a period exceeding one year, that bears a later date than 31st December, 1864, and

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(*a*) This Section was repealed and re-enacted with modifications by Sections 15-17, Act X, 1862.

(*b*) In *Hiraman Rai*, VII, W. R., 104, it was held the Judge has a discretion. But in *Rughonath Bote*, 1, W. R., 177, and some English cases, it was held that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those authorized to exercise the authority when the case arises. See Section 15, Regulation VIII, 1800.

(*c*) See *D. Pamoty*, H. C., 4th December, 1867.

(*d*) H. C., Circular No. 9, 1867. See *Bunwari Lall*, VII, Moore 168.

no unregistered *kabuliyat* for a period exceeding one year, that bears a later date than 30th April, 1866, is receivable in evidence (*a*). But registration of old deeds is not imperative (*b*).

When the suit may be disposed of at the first hearing.—(Sections 144-145 Code of Civil Procedure.) By Section 63, Act X, "If after the examination required by Section 59, and also the examination of any witness who may attend to give evidence on behalf of either of the parties (Section 61), and after a consideration of the documentary evidence adduced, a decree can be properly made without further evidence, the Collector shall make his decree accordingly." By Section 145, Code of Civil Procedure, the decree can be "properly" made at the first hearing, when the parties are not at issue on any question of law or fact, or when no further argument or evidence than such as the parties or their pleaders can at once supply is required upon any such of the issues of law or fact as may be sufficient for the decision of the suit. In one case it was said a decree can be made at the first hearing only if both parties have adduced their evidence, and the decree can be properly passed (*c*).

Of the settlement of issues.—(Sections 133-149, Code of Civil Procedure.) By Section 65, Act X, "If after such examination as aforesaid it appear that the parties are at issue on any question, upon which it is necessary to hear further evidence, the Collector shall declare and record such issue, and shall fix a convenient day for the examination of witnesses and the trial of the suit; and the trial shall take place on that day, unless there be sufficient reason for adjourning it, which reason shall be recorded by the Collector." Section 139, Code of Civil Procedure, provides that the Court may frame the issues from

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(*a*) Board's Rules, Chapter XVI, Section 11, Clause 4.

(*b*) *Karu Lall Thakur*, H. C., 21st June, 1867.

(*c*) *Reaz-un-Nissa*, H. C., 7th July, 1865.

the allegations of fact (*a*) which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference between such allegation of fact and the allegations of fact contained in the written statements. Section 141 provides for the amendment or addition of issues at any time before the decision of the case on such terms as to costs or otherwise as may be proper. Irrelevant issues may be set aside (*b*).

The evidence must correspond with the issues fixed. A plaintiff will not be allowed to set up one case, and having proved another, to ask for issues to be raised to suit the proof; but when a plaint and its proof necessarily tend to one or more particular issues, it is the duty of the Court, if these issues do not come by surprise on the defendant, to raise such issues (*c*).

In 1859, the Sudder Court laid down a form for recording issues, shewing separately the issues in bar of suit on the plaint, the issues of fact, and the issues of law arising out of fact found.

As the evidence must be confined to the points in issue, error in fixing them will lead to a miscarriage of justice. Mr. Macpherson says:—"In distinguishing the real points at issue, a close attention to the pleadings will generally guide the Court safely, and most of the miscarriages in this respect seem attributable to the want of an attentive analysis of the con-

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(*a*) The pleader may bind his client by a statement of facts, but not of law. *Jeshoda Kunwar*, H. C., 10th August, 1866.

(*b*) *Tarak Nath Mukherjya*, III, W. R., 147. Sections 142-143, Code of Civil Procedure, provide for issues by agreement of parties.

(*c*) *Obhoy Churn Mullik*, II Hyde, 203. The rules that the evidence must correspond with the issues is further illustrated by the cases of *Nara Hari Mahunt*, H. C., 12th August, 1862; *Fatima Bibi*, 23rd January, 1863; *Guru Dass*, 31st March, 1864, and *Umesh Chunder Biswas*, 8th June, 1864. *Eshan Chunder Singh*, F. C., 3rd November, 1866. But the rule as to variance is not to be too strictly enforced. *Rajender Kishwar Singh*, H. C., 11th April, 1866; *Baidy Nath Saha*, H. C., 16th August, 1865.

flicting allegations' (*a*). When the plaintiff sued for arrears at an enhanced rate, alleging that defendant had always held 191 *bighas* of land at a rent of Rs. 51, but that he now held 216 *bighas*, and was, therefore, at the prevailing rate of Rs. 2 a *bigha*, liable to pay a rent of Rs. 428, and the defendant replied that he only held 171 *bighas* at a fixed rate of Rs. 51, and had held this from time immemorial, and the only issue fixed was whether the claim was just or not, the High Court said this was, in fact, no issue at all; the specific question upon which the parties are at dispute should be placed in issue, and the parties called upon to produce evidence to that question (*b*). In another similar case, in which the defendant pleaded payment of rent at an uniform rate from the date of the Permanent Settlement, and filed *dakhilas* in support of his statement, and the only issue laid down was, whether the *jumma* was liable to enhancement, the Court said this was insufficient. The intent of requiring a careful examination of the parties instead of the old pleadings is to elicit the particular points on which the parties are at issue. In this particular case, the tenant should have been required in his examination to attest the *dakhilas* himself as far as he could. All the *dakhilas* which had been given to him personally he could prove as well as any other witnesses. Tenants cannot be expected in every case to summon all the *gomashtas* of their *zamindars* for the past twenty or thirty years to attest their *dakhilas*. The tenant having deposed to their genuineness so far as he can, it will remain for the *zamindar* or his agent to deny their genuineness. He also should be examined regarding them. A mere general statement that they are false should not be listened to. He should be required to detail his reasons for so stating, and if they appear to have any foundation, an issue should be laid down as to the genuineness of the *dakhilas*, and

(*a*) Civil Procedure, p. 198.

(*b*) *Reaz-un-Nissa*, H. C., 7th July, 1865

both parties required to produce further evidence on the point (*a*). In a recent Full Bench ruling, this judgment was generally confirmed, but it was said that it is not necessary to fix an issue as to the genuineness of *dakhilas* which are filed to prove an issue already laid down, or any important fact in the cause (*b*). In a claim founded on a *kabuliyat*, the only points for decision are the fact of execution and the existence of a balance (*c*). In connection with this ruling, it is, perhaps, worth while observing that the rule of evidence confining evidence to the points at issue is frequently misunderstood by *mukhtars*. For instance, in the very common case of a rent suit on a *kabuliyat*, in which the defendant denies the genuineness of the *kabuliyat* and pleads either that he has never held the land at all, or that he has held it under a third party, as a matter of course, an issue is fixed as to the genuineness of the *kabuliyat*. When the evidence comes to be taken, if the defendant attempt to offer proof that he never was in possession, or that he holds the land under another party, this is at once objected to as inadmissible and foreign to the issue. But the slightest consideration shows that it is evidence very material to the right decision of the issue. The fact of his never having held possession of the land is one which affords a very strong presumption, indeed, that he never executed a *kabuliyat* for the land. "The rule," says Mr. Taylor, "excludes all evidence of collateral facts which are incapable of affording any reasonable presumption as to the principal matter in dispute * * * The due application of this rule will occasionally tax to the utmost the firmness and discrimination of the Judge, so that, while he shall reject as too remote every part which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant

(*a*) *Rajishwari Debya*, H. C., 11th December, 1865.
(*b*) *Krithe Dass Maiti*, H. C., 31st May, 1867, F. B.
(*c*) S. D., 1850, 360.

the evidence of all those matters which shed a real, though perhaps an indirect and feeble. light on the question at issue. And here it will be found that the circumstances of the parties to the suit, and the position in which they stood when the matter in controversy occurred, are proper subjects of evidence" (*a*). When a suit for arrears at an enhanced rate was brought, and the defendant pleaded that in *Chyte*, 1173, B. S., he obtained two *pottahs* for 69 *bighas* 10 *kathas*, at an aggregate rent of Rs. 79-12-6 pie, and that he continued to pay this rent to 1245, B. S., in which year the two *jummas* were consolidated by consent of the *zamindar*, and then divided into three *jummas*, each bearing one-third of the former aggregate rent, and consequently that having paid the same rent from the time of the Decennial Settlement he was exempt from enhancement, and the Judge finding that rent had been paid at an uniform rate for 20 years, dismissed the suit, the High Court said the presumption of Section 4 can only be legitimately employed in cases in which existing circumstances are stated to have continued from the date of the settlement, and proof of such continuance for more than 20 years is given. In this case the existence of the present circumstances dated only from 1245, and the issue to be tried was whether the existing circumstances were essentially identical with those existing prior to 1245 (*b*). When suit for a *kabuliyat* at enhanced rate is met by a claim to hold at fixed rates, the issues to be determined are, whether the rent of the land has been changed since the Permanent Settlement, or, if that cannot be decided, whether it has been changed during the 20 years preceding the suit (*c*).

Of adding parties under Section 77.—By Section 77, Act X, "when in any suit between a landholder and a *ryot* or

(*a*) Taylor on Evidence, Vol. I, Part II, Chapter II.

(*b*) *Ram Kumar Mukherjya*, H. C., 5th January, 1865.

(*c*) *Asghar Ali Chaudhari*, H. C., 23rd June, 1864. See also *Srinath Dutt Chaudhari*, 15th June, 1866.

under-tenant, under this Act, the right to receive the rent of the land or tenure cultivated or held by the *ryot* or under-tenant is disputed, and such right is claimed by or on behalf of a third person, on the ground that such third person, or a person through whom he claims, has actually and in good faith received and enjoyed such rent before and up to the time of the commencement of the suit, such third person shall be made a party to the suit, and the question of the actual receipt and enjoyment of the rent by such third person shall be enquired into, and the suit shall be decided according to the result of such enquiry. Provided always that the decision of the Collector shall not affect the right of either party who may have a legal title to the rent of such land or tenure, to establish his title by suit in the Civil Court, if instituted within one year from the date of the decision." Section 140 lays down a similar rule for suits as to distraint.

This Section provides for intervention only when the intervenor has been in good faith in receipt of the rents up to the time of the commencement of the suit, or claims through a party who has thus received the rents. It does not contemplate intervention by strangers or by persons who have not been in possession, however good their title (*a*). The only question that can be tried is the actual receipt of the rent previous to the suit (*b*). Thus, when a third party intervened on the ground of inheritance from the plaintiff's deceased wife, from whom plaintiff also claimed under a will, and the Lower Court dismissed his suit on the ground that the will under which plaintiff claimed was not proved, the High Court remanded the suit for enquiry into previous receipt of

(*a*) *Mohesh Chunder Sirkar*, H. C., 18th November, 1865. But See *Ram Jivan Chaudhari*, 21st November, 1865, and other cases quoted below.

(*b*) *Prolad Singh*, H. C., 19th March, 1863; *Vejon Singh*, 4th August, 1863. The rule as to the point to be tried in the event of parties intervening in a suit for measurement is the same. *Haradhan Dutt*, H. C., 29th June, 1866.

the rent (*a*). If a third person intervene, on the allegation that an intermediate lease has been granted to him, it is not the genuineness of the lease which has to be tried, but which party has been in receipt of the rents (*b*). So, too, when the intervenor's allegation was that the lands belonged to his village (*c*), and that intervenor had a legal title to the land (*d*), it was ruled that the case must be decided according to the previous receipt of the rent.

But it has been repeatedly ruled that there is nothing in this Section to authorize a decree in favour of a party who proves merely a previous receipt of the rent, if that proof is met and answered by proof that his right has ceased (*e*). If an intervenor shows conclusively, by a final decree of the Civil Court, that the right to receive rents has been decided in his favour and against the plaintiff, the Collector cannot give the plaintiff a decree, notwithstanding that he may have been collecting the rents (*f*). If it is shown that the plaintiff has sold his estate and inducted the vendee, a decree for rent cannot be given in his favour, notwithstanding he may have been in previous receipt of the rent (*g*). So, too, when a decree against the plaintiff for possession has been obtained and executed (*h*), when he has been ousted by a decree under Section 25, Act X, in favour of the *zemindar* (*i*), when the *kabuliyat* upon which he sues has been set aside by the Civil Court (*j*), when the tenure of the plaintiff, a *sepulneedar*,

(*a*) *Mirza Zahid Ali*, H C, 5th August, 1862

(*b*) *Shama Churn Halda*r, H C, 13th May, 1862.

(*c*) *Chatouri Misser*, S D, 8th May, 1862

(*d*) *Watson & Co*, S D, 8th March, 1862.

(*e*) *Sayamani Debya*, H. C, 16th December, 1864. But See *Mansur Ali Khan*, 12th December, 1864.

(*f*) *Syud Ahmad Raza*, H C, 5th August, 1863.

(*g*) *J Smith*, H C., 2nd November, 1864.

(*h*) *Srinath Ghosal*, H. C, 17th May, 1865

(*i*) *Mohesh Chunder Pal Chaudhari*, S D, 14th June, 1862.

(*j*) *Anand Mohan Ghose*, S. D, 27th March, 1862.

had been cancelled by a sale of the superior *durputnee* tenure for arrears (*a*), when the lease of the plaintiff, a *dur ijaradar*, had been cancelled by the cancelment for arrears under Section 78, Act X, of the superior *ijara* lease (*b*), when the defendant established a will made by the plaintiff landlord, by which the plaintiff's title was disproved (*c*), in all these cases it was held that decree could not be given in favour of the plaintiff, notwithstanding that they had been in receipt of the rent up to the commencement of the suit. But if the plaintiff's title has not been clearly and undoubtedly extinguished, when, for instance, the decree against the plaintiff had never been executed (*d*), when the decree was one for possession against his lessor, and it was not clear that his rights were affected by it (*e*), when the decree against the plaintiff was in terms so general and ambiguous that its application to the property in suit was uncertain (*f*), when the intervenor was no party to the Civil suit (*g*), when the land had been awarded to another party in a *butwarra* award (*h*), in these cases it was ruled that the suits must be decided according to the previous receipt of the rents, and that decree might be given upon the strength of such previous receipt, notwithstanding the doubtful character of the claimants' titles.

In a case decided in 1861, it was said that Section 77 applies only where both parties claim rent from the same *ryot*, and

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(*a*) *Ram Jiwan Chaudhari*, H. C., 21st November, 1865, *Sheikh Ali Buksh*, H. C., 21st November, 1865.

(*b*) *Aughur Chunder Mukherjya*, H. C., 24th August, 1866.

(*c*) *Bani Madhub Ghose*, H. C., 11th September, 1866, F. B. See *Gaur Dass Byragee*, H. C., 9th January, 1867.

(*d*) *Punchanun Banerjya*, H. C., 27th March, 1862; *Rai Churn Rai*, H. C., 6th September, 1866.

(*e*) *Shiveshurt Dai*, H. C., 4th August, 1865.

(*f*) *Syud Ahmad Raza*, H. C., 5th August, 1863.

(*g*) *Raj Kumar Chaudhari*, 6th January, 1866.

(*h*) *Srinath Ghosal*, H. C., 17th May, 1865.

not to a case where intervenor claims rent for the same land, but from a *ryot* other than the *ryot* sued by the plaintiff (*a*). So, too, when the Nawab Nazim sued *kurk sazawals* on an *ikrar*, and was met by an intervention, on the ground that the farmer of the land had given intervenor a *kabuliyat* for the same land, the Court said this was no answer to the plaintiff's claim (*b*). But in the case of *Shiveshuri Dai*, already cited, intervention by a party claiming rent from a *ryot* other than the one sued was admitted (*c*).

A suit on a *kabuliyat* which the Court did not trust was rightly dismissed without trying the case as between the plaintiff and the intervenor (*d*). The receipt of rent as an agent does not, of course, give a right to the continued receipt of the rent after the agency is determined (*e*). In one case it was said, the whole *onus* of proving previous receipts rests with the intervenor (*f*). In another, in which the *ryot* admitted the intervenor's title, it was ruled that the *onus* lay on the plaintiff (*g*). The whole of the claim should not be dismissed when the intervenor establishes his title only to a portion of the rent (*h*). If it be found that the intervenor is entitled to the rent, the claim should be dismissed, even though the intervenor admits that he is plaintiff's tenant and liable to the plaintiff for rent (*i*). As to intervention by sharers of the plaintiff, it was held that it is only when

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(*a*) *Pran Nath Rai Chaudhari*, S. D., 5th December, 1861.

(*b*) *Mansur Ali Khan*, H. C., 12th December, 1864.

(*c*) 4th August, 1865.

(*d*) *Aziz Ahmad Ghazi*, S. D., 24th April, 1862. See *Kundra Pradhan*, S. D., 11th June, 1862.

(*e*) *Gopal Chunder Rai*, H. C., 1st June, 1864, *Kadambare Debya*, 4th August, 1864.

(*f*) *Kishan Chunder Dass*, H. C., 27th January, 1865.

(*g*) *Khameshuri Debya*, H. C., 8th July, 1864.

(*h*) *Sheo Prasad Chaudhari*, H. C., 2nd September, 1863.

(*i*) *Kali Churn De*, H. C., 27th January, 1863.

the estate has been severed by partition that each sharer is entitled to sue for his own share of the rent (*a*).

As to the Civil suit to contest an order under Section 77, it has been held that if appeal be made to the Collector, the limitation of one year runs from the date of the decision in appeal; after that date, claim to the rent in suit is barred; but a suit for the property itself is not barred (*b*). A decision by default is no decision for the purpose of this limitation (*c*). A *ryot* having a right of occupancy, who has been evicted by a judgment in favor of an intervenor under this Section, may sue to establish his title within this limitation (*d*).

An intervenor, who has not been a party to the suit in the Lower Court, cannot appeal (*e*); but in one case, in which such an appeal was made, the Sudder Court held that the case should be remanded to the Collector to be tried *de novo* (*f*). From this case, it seems that the Collector should of his own accord make third parties, to whom defendants allege they have paid their rents, parties to the suit (*g*). A party to whom the rents payable under a lease are assigned to liquidate a loan cannot intervene (*h*). A minor cannot intervene in person (*i*).

(*a*) *Per* Peacock, C. J., in *Beni Madhub Ghose*, H. C., 11th September 1866, F. B.

(*b*) *Janoke*, H. C., 13th September, 1865; *Denonath Bose*, 5th February, 1866, F. B.; *Kishan Kumar Laha*, 16th May, 1866, *Guru Dass Gangule*, 20th December, 1866.

(*c*) *Mansam Ali*, H. C., 15th December, 1865.

(*d*) *Tarakant Bhuttacharjya*, H. C., 17th May, 1867.

(*e*) *Mohender Chunder Ghose*, H. C., 28th April, 1863.

(*f*) *Tara Chand Poddar*, S. D., 5th September, 1861. See *Hurdya Singh*, H. C., 7th September, 1865. In *Khondkar Kifaiatulla*, H. C., 5th March, 1868, it was held the Judge had no jurisdiction to remand a case for the purpose of trying an intervenor's claim.

(*g*) As to receipt in good faith, see *Bhyrub Chunder Chand*, H. C., 4th December, 1867.

(*h*) *Giridhari Singh*, H. C., 5th December, 1867 (?)

(*i*) *Bamasundari Debya*, H. C., 21st December, 1865.

Of adding parties.—By Section 73, Code of Civil Procedure, if it appear to the Court at any hearing of a suit, that all persons who may be entitled to, or who may claim some share or interest in the subject-matter of the suit, or who may be likely to be affected by the result, have not been made parties to the suit, the Court may direct that such persons be made either plaintiffs or defendants, as the case may be (*a*). The decisions as to adding parties in other cases than that provided for by Section 77, Act X, have been very conflicting. In a case in which a *ryot*, on being sued for rent, pleaded that he had sold a portion of his land, the Sudder Court ruled that the vendee should be made a party (*b*). In another case it was said a purchaser of a transferable tenure may defend a suit brought against his vendor for arrears said to have accrued before the date of purchase, even though he has not registered the transfer, as the tenure is imperilled should such arrears be proved (*c*). In a later case, it was said an intervenor claiming to be the tenant by purchase of a part of the tenure cannot be heard in a suit for arrears. But the Court should decree against the vendor only so much of the rent as was proved to be due from him (*d*) When suit was brought on a *kabuliyat* given by A, and B intervened, on the allegation that he held the land under a *pottah* from the vendor of A's lessor, the Court said this intervention clearly was not one contemplated by Section 77; and Act X does not expressly provide for any other intervention. The plaintiff was entitled to a decree, but this could not in any way prejudice the rights of the intervenor (*e*). When the plaintiff sued the registered tenant, who did not appear, for

(*a*) See *Padma Lochon Sen*, H. C., 20th August, 1868.

(*b*) *Tara Chand Poddar*, S. D., 5th September, 1861.

(*c*) *Shiva Narain Bhuttacharyya*, S. D., 5th September, 1861.

(*d*) *Hara Mohan Mukharyya*, H. C., 6th August, 1864. See *Hara Mohan Mukharyya*, 26th November, 1864.

(*e*) *Guru Dayal Panre*, H C., 22nd May, 1865.

arrears at an enhanced rate, and a third-party intervened, alleging that he was the real tenant holding under a lease from the plaintiff, and that the suit was a collusive one to destroy his title, it was held that this intervention could not be admitted, but that the decree would not prejudice intervenor's rights (*a*). On the other hand, when in a suit for arrears the defendant did not appear, and a third party intervened, on the allegation that he had purchased a part of the tenure, the High Court said the intervention should be allowed (*b*). And when in a suit for arrears at an enhanced rate, a third party intervened, alleging that he had purchased the tenure at public auction, and was in possession, and that the suit was a collusive one, brought to defeat his title, the Court said the intervention should be admitted, the absence of any provision the law to meet the case notwithstanding (*c*). When a *ryot* intervenor was made a co-defendant at the plaintiff's request, the plaintiff could not afterwards get rid of the consequence of his own Act (*d*).

Of the day of trial.—By Section 66, Act X, "The parties shall bring forward their witnesses on the day of trial, and if either party require assistance to procure the attendance of a witness on such day, either to give evidence or to produce a document, he shall apply to the Collector in sufficient time before the day fixed for the trial, to enable the witness to be summoned to attend on that day; and the Collector shall issue a summons requiring such witness to attend." By Section 68, "If on the day fixed for the trial of any issue, neither of the parties appear, the case shall be struck off under the conditions provided in Section 54. If on any such day, one only of the

(*a*) *Jogender Chunder Ghose*, H. C., 20th June, 1867. *Durgu Naraian Rae*, H. C., 2nd September, 1868.

(*b*) *Annoda Prasad Kund Chaudhari*, H. C., 15th June, 1865.—See *Jamarat Mundul*, H. C., 3rd July, 1868.

(*c*) *Ishwar Chunder Bhuttacharjya*, H. C., 3rd August, 1865.

(*d*) *Sham Chand Ghose Mandul*, H. C., 2nd March, 1868.

parties appear, the issue may be tried and determined in the absence of the other party, upon such proof as may be then before the Court."

Of adjournments (Sections 146-148, Code of Civil Procedure).—By Section 72, Act X, "The Collector may in any case grant time to the plaintiff or defendant to proceed in the prosecution or defence of a suit, and may also from time to time, in order to the production of further proof, or for other sufficient reason, to be recorded by the Collector, adjourn the hearing or further hearing of any case in such manner as to him may seem fit." In a case involving a question of title, in which an absentee landlord was plaintiff, it was held longer time should have been allowed (*a*). It is, however, optional to give longer time or not (*b*). Refusal to do so is not a ground for special appeal (*c*). By Section 146, Code of Civil Procedure, the party applying for time must pay the costs occasioned by the adjournment. No adjournment can be granted except *vivâ voce* in open Court, and a list of adjourned cases is to be hung up in the Court house (*d*). If a new issue is fixed on the day of trial, the case must be adjourned (*e*).

Of witnesses.—By Section 67, Act X, "The provisions of the Regulations and Acts, and all other rules for the time being in force relating to the evidence of witnesses—for procuring the attendance of witnesses and the production of documents—and for the examination, remuneration, and punishment of witnesses, whether parties to the case or not, in cases before the Civil Courts of the Presidency of Bengal, shall, except in so far as the same may be inconsistent with the provisions of this Act, apply to, and be of equal force and effect in, suits under this Act."

(*a*) *Narender Naraian Bhup*, S. D., 31st July, 1862.
(*b*) *Eshan Chunder Rai*, S D., 26th June, 1862.
(*c*) *Kishen Jivan Bukshee*, H. C., 5th August, 1863.
(*d*) Board's Rules, Chapter XII, Section 2.
(*e*) *Srihari Mondul*, H. C., 16th July, 1868.

Evidence of witnesses.—No Code of evidence has yet been passed; and, as recently observed by the Chief Justice, the English law of evidence has never been extended to this country (*a*). The law of evidence at present in force is contained in Act II, 1855, and in various precedents of the Sudder and High Courts.

Of summoning witnesses.—By Section 144, Code of Civil Procedure, "The parties may, at any time after the defendant has been summoned, apply for issue of summons to witnesses, and in any such summons the names of any number of persons may be inserted. When, some time after the date fixed for the hearing, the plaintiff applied for issue of summons, and summons was directed to be issued, he could not raise the objection that the Court decided the case against him without summoning all his witnesses, as it was his duty to secure their attendance in due time (*b*). If the case of a party be not closed, he may summon witnesses, even though he has previously declared he would rest his case on the opposite party's deposition (*c*). Fresh witnesses may be summoned at any time before the case is tried (*d*). When a suit is remanded for the production of particular evidence, parties should not be allowed to bring forward other fresh evidence (*e*). Under Act XXVI, 1867, the first application for issue of summons is exempt from stamp. Subsequent applications require a one-anna or an eight-anna stamp, according to the amount of the suit. By Section 151, Code of Civil Procedure, the expenses of the witnesses are to be paid before issue of summons, and this amount is to be tendered to the witnesses with the summons. If the sum be insufficient, or if the witnesses be detained longer than one day, the Court may order an additional sum to be paid; and on default of payment, may discharge the

(*a*) *Queen* vs. *Khairulla*, VI, W. R., Criminal Rulings 21.

(*b*) *Tiluk Chand Saha*, II C., 17th February, 1864.

(*c*) *Bangsi Lall*, II C., 3rd December, 1863.

(*d*) *Gora Chand Ghose*, V, W R., 3.

(*e*) *Bulaki Lall*, II C., 22nd December, 1864.

witness. A witness is not entitled to compensation for mere loss of time (*a*).* By Section 152, Code of Civil Procedure, the summons must specify the time, place, and purpose of attendance. By Section 153, Code of Civil Procedure, persons summoned to produce a document need not attend in person.

Of service of summons.—By Section 154, Code of Civil Procedure, summons shall be served by exhibiting the original and tendering a copy, and it must be served in a reasonable time before the day fixed. When sufficient time was not allowed, and the case was decided in the absence of the witnesses, the case was remanded (*b*). By Section 155, Code of Civil Procedure, the service is to be upon the witness or upon an adult male member of his family residing with him. It will not be sufficient if made on a member of the family living in the same homestead, unless the parties are living together in commensality (*c*). By Section 154, Code of Civil Procedure, when the summons cannot be served, it is to be returned to the Court with an endorsement to that effect. By Section 157, if served, the time and manner of service are to be endorsed upon it. By Section 158, summonses to witnesses resident in other jurisdictions may be served through the local Court. By Section 159, if the summons cannot be served, the Court, on being certified thereof by the return of the serving officer, and upon proof that the evidence is material, and that the witness keeps out of the way for the purpose of avoiding the service of summons, may cause a proclamation requiring the attendance of the witness at a time and place to be named therein, to be affixed on his house; and if he fail to attend, the Court may, at the instance of the party applying for summons, order the attachment of the moveable and immoveable property of the witness, to a reasonable amount, not being

(*a*) *Nawab Nazin*, II, Hyde, 236. By the former law, Section 12, Act XIX, 1853, the witness whose expenses were not paid could refuse to give evidence, but now the discretion to discharge him rests with the Court.

(*b*) *Shikh Komyab*, H. C., 27th June, 1864.

(*c*) S. D. Circular, 29th July, 1859.

in excess of any fine to which he may be liable. By Section 160, Code of Civil Procedure, if thereupon the witness appear and satisfy the Court that he was not purposely keeping out of the way, the property shall be released, and the Court may make such order as to the costs as may be fit. If he shall not appear, or appearing shall fail so to satisfy the Court, the Court may order the attached property to be sold to satisfy the costs of the attachment, together with the amount of any fine which the Court may impose on the witness under the law for the punishment of absconding to avoid service of summons (Section 72, Penal Code). If the witness pay the fine and costs, the property shall be released (*a*).

Attendance of witnesses and consequences of non-attendance.—By Section 167, Code of Civil Procedure, persons summoned must attend. By Section 148, if a witness served with a summons fails to attend without lawful excuse, he may be arrested. If he cannot be found, his property may be attached and sold, as before provided. An application for attachment should not be refused unless the applicant has connived at the absconding of the witness (*b*). Reasonable applications to compel the attendance of important witnesses should not be rejected without good cause (*c*). By Section 169, Code of Civil Procedure, persons refusing without lawful excuse to give evidence may be committed to custody and punished under Sections 175 and 179, Penal Code, and Chapter X, Code of Civil Procedure. By Section 170, Code of Civil Procedure, if a party to the suit refuses to give evidence, or to attend, the Court may either pass judgment against the party, or make such order as may be proper. The Court has a discretion (*d*). When a plaintiff cited as a witness

(*a*) It has been held recently that there is no power to impose a fine under these sections.—*Gujadhur Prasad Narain Singh*, II. C., 6th August, 1868.

(*b*) *Raju Singh*, II, W. R., 26.

(*c*) *Anand Lall Rai Chaudhari*, H. C., 1st August, 1865.

(*d*) *Gopal Lall Bose*, V, W. R., 89; *Raj Chunder Ghose*, VI, W R., Act X Rulings, 86.

refuses to attend, the law does not necessitate dismissal (*a*). This penalty does not apply to a party required only to attend and not to give evidence (*b*). The non-appearing party may appeal (*c*). If there are several parties, and only one fails to appear, judgment should only be given against that party (*d*). Wilful default should be shown (*e*). The Court may decree in favor of the recusant if there be enough evidence without his (*f*). When the defendant's witnesses, who were servants of the plaintiff, were kept out of the way, the suit was properly dismissed (*g*).

Of the examination of parties as witnesses.—By Section 161, Code of Civil Procedure, a party to a suit appearing in person may be examined as a witness. By Section 162, if one party requires the attendance of any other party to the suit, he shall make a special application to the Court, and show sufficient grounds for such application. By Section 163, the Court may, if it think fit, first issue a notice to the party to show cause why he should not give evidence. By Section 164 the Court shall receive any written declaration on unstamped paper duly signed and verified by the party in support of the cause shown. By Section 165, if no sufficient cause be shown, summons shall issue. A tenant suing under Act X, is entitled to summon his *zamindar* as a witness (*h*). An order refusing such application is final (*i*). But the order should show on the face of it that judicial discretion was used (*j*). When a Judge, acting on a wrong

(*a*) *Aziz-un-Nissa*, H. C., 15th April, 1863.

(*b*) *Jugal Chunder*, I, W. R., 80.

(*c*) *Ramsaran Dass*, N. W. P., 1862, 29.

(*d*) *Binod Ram Sen*, I, W. R., 168.

(*e*) *Data Harakman Singh*, VI, W. R., 247.

(*f*) *Bisonath Mujumdar* Marshall, 467.

(*g*) *J. C. Bagram*, H. C., 1st July, 1864.

(*h*) *Supal Khan*, H. C., 21st December, 1865. See cases quoted before under Section 64, "Examination of parties."

(*i*) *Ram Saran Singh*, I, W. R., 83.

(*j*) *Hara Chand Poramanik*, I, W. R., 298.

assumption of facts, rejected such an application, the High Court entertained a special appeal, and remanded the case (*a*). It is not proper to refuse the application merely because other material witnesses are relied on or may be called (*b*). Natives of rank, who rely on their privilege and refuse to give evidence, must take the consequences if their witnesses are not believed (*c*). Legal reasons need not be given for refusing to summon a party (*d*).

Of the power of the Court to summon witnesses.—By Section 166, Code of Civil Procedure, if the Court shall think it necessary, it may, of its own accord, at any stage of the suit, cause a party to be summoned to give evidence or to produce a document. It has been held that this Section is subject to the limitation of Section 175, and not to that of Section 42 (*e*). By Section 171, Code of Civil Procedure, any person present in Court, whether a party to the suit or not, may be called on by the Court to give evidence or to produce a document. By Section 9, Act XXIII, 1861, the Court may, of its own accord, summon any person as a witness. The costs, if not deposited by either party, shall be paid by the Collector, and shall be paid out of the money recovered on account of costs, whether at the instance of Government or of either party before any other costs in the suit are paid.

When and how witnesses are to be examined.—By Section 172, Code of Civil Procedure, every witness is to be examined *viva voce* in open Court, in the presence and hearing, and under the personal direction and superintendence, of the Collector. In appealable cases, the evidence shall be recorded in the vernacular, in the form of a narrative, in the presence of

(*a*) *Nim Chand De*, II, W. R., 218.

(*b*) *Matungini Debya*, II, W. R., 4.

(*c*) *Ram Mohan Mukharjya*, I. W. R. 54.

(*d*) *Shideshwari Debya*, II. C., 3rd July, 1866.

(*e*) *Tirpal Singh*, N. W. P., 1865, 153. But see *Shaikh Gholam Ahya*, H. C., 15th August, 1865.

the parties, and shall be then read over in presence of the parties, and if necessary, corrected, and signed by the Collector. If taken down in a language the witness does not understand, the witness may require it to be interpreted to him. If all parties present, and the pleaders of those absent, consent to have it taken down in English, the Collector may so take it down in his own hand. If necessary, particular questions and answers may be recorded. Questions objected to, and allowed to be put, must be taken down with the objection. Remarks regarding the demeanour of the witness may be recorded. The Collector shall make a memorandum in his own vernacular (or in English, if he understands it) of the substance of the deposition, as the examination proceeds, and sign it. If he cannot make this memorandum, the reason must be recorded In non-appealable cases, the memorandum alone is sufficient. If the evidence is not properly taken, the case will be remanded (*a*). The Board have ruled that Appellate Courts must report to the Commissioner every case in which the above provisions are not complied with. The evidence of the party upon whom the *onus* rests is to be taken first (*b*). The signature of a witness to his deposition is not necessary (*c*). By Section 173, Code of Civil Procedure, a witness may be examined at any time after the institution of the suit, if necessary. By Section 174, the examination is to be on oath or solemn affirmation under Act V, 1840. The witnesses should be asked from what source they obtained their knowledge of the facts they depose to (*d*). They should not be examined in driblets (*e*).

Of the punishment of witnesses.—By Section 16, Act XXIII, 1861, when any witness or other person shall appear to the

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(*a*) *Fazl-un-Nissa*, N. W. P., 1862, 180.

(*b*) Board's Rules, Chapter XII, Section 2.

(*c*) Bombay H. C., 28th June, 1860.

(*d*) *Riaz-un-Nissa*, H. C., 7th July, 1865.

(*e*) *Gunga Gobind Rai*, H. C., 5th September, 1865.

Court to have been guilty of an offence described in Section 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, or 210 of the Penal Code (*a*), the Court may commit such person to the Sessions, or after making preliminary investigation, as may be necessary, may send the case for investigation to the Magistrate (*b*). Collectors trying Act X suits may commit to the Sessions (*c*). When the case is appealable to the Judge, the Collector cannot sanction the institution of proceedings under Section 169, Criminal Procedure Code (*d*). A Civil Court should see that there is a *primâ facie* case before sanctioning criminal proceedings (*e*). When sanction is given by a Civil Court to prosecute particular persons for a particular offence, the Magistrate cannot commit other persons for a different offence, without obtaining fresh sanction (*f*). A Collector cannot issue a warrant under this Section for the arrest of parties not before the Court (*g*). No appeal lies against an order sanctioning criminal proceedings (*h*). By Section 17, Act XXIII, 1861,

(*a*) These Sections relate to:—

193-5	False evidence.
196	Use of false or fabricated evidence.
199	False declaration.
200	Use of false declaration.
205	False personation.
206	Fraudulent concealment of property.
207	Fraudulent claim to property.
208	Fraud in suffering a decree to be passed.
209	Fraudulent suit.
210	Fraud in getting a decree passed.

(*b*) Section 169, Code of Criminal Procedure, Sections 211 and 228.

(*c*) *Bunsi Singh*, I, W. R., Criminal Rulings, 47.

(*d*) *Nawazish*, N. W. P., 1862, 318; *Pusu Ram*, VI, W. R., Criminal Rulings, 11.

(*e*) *S. C.*

(*f*) *Dwarkanath Bose*, II, W. R., Criminal Rulings, 31; *Sheosahai Singh*, N. W. P., 1863, 75. See *Pran Nath Chaudhari*, Marshall, 270.

(*g*) H. C. Letter, 1774, 1863.

(*h*) *Ram Pershad Hazari*, H. C., 31st January, 1866.

the Court may send the accused persons in custody to the Magistrate, or take sufficient bail for their appearance, and bind over the witnesses to give evidence. By Section 18, Act XXIII, 1861, when the commitment is made by the Court, the record with the charge shall be sent to the Magistrate, who shall bring the case before the Sessions. By Section 19, Act XXIII, 1861, when there shall appear sufficient ground for sending for investigation to the Magistrate a charge described in Section 463, 471, 475 or 476, Penal Code (*a*), preferred in respect to any document offered as evidence in the case, the Court may make the case over to the Magistrate. An accused person sent to the Magistrate on a charge of forgery may be committed on a charge of using a forged document, or abetment of forgery (*b*). By Section 20, Act XXIII, 1861, if the accused person be a European British subject, he must be sent to a Justice of the Peace. In addition to the above offences, Section 171, Code of Criminal Procedure, allows a Civil Court to send for investigation to a Magistrate charges of contempts of the lawful authority of any Court or public servant, or of any other offence against a public servant as such described in chapter X of the Penal Code, not falling within Section 163 of the Criminal Procedure Code (corresponding with Section 21, Act XXIII, 1861). By Section 21, Act XXIII, 1861, when any such offence, as is described in Section 175, 178, 179, 180, or 228, Penal Code (*c*), is committed in the view or presence of any

(*a*) These Sections relate to:—
- 463 Forgery.
- 471 Using forged documents.
- 475 Counterfeit devices or marks.
- 476 Fraudulent destruction of documents.

(*b*) *Mohesh Chunder Acharjya*, VI, W. R., Criminals Rulings, 20.

(*c*) These Sections relate to:—
- 175 Omission to produce documents.
- 178 Refusal to take oath.
- 179 Refusal to answer questions.
- 180 Refusal to sign statements.
- 228 Contempt of Court.

Court, it shall be competent to such Court to detain the offender in custody, and at any time before the rising of the Court, on the same day, to take cognisance of the offence, and sentence the offender to Rs. 200 fine, or, in default of payment, to one month's imprisonment in the Civil Jail. In every such case the offender shall record the facts constituting the contempt, with any statement the offender may make, and the finding and sentence. If a serious punishment is called for, the accused person should be sent to the Magistrate. It is not discreet for Collector to make over for trial to himself as Magistrate a charge of contempt of his own Court (*a*). By Section 22, Act XXIII, 1861, offenders sentenced to punishment under the last Section may be discharged on their submission.

Of commission to examine absent witnesses.—By Section 175, Code of Civil Procedure, when the evidence of a witness is required, who is distant more than 100 miles from the place where the Court is held, or who is unable from sickness or infirmity to attend, or is a person exempted by reason of rank or sex from personal appearance, the Court may, on its own motion, or on application of the parties, or on the representation of the witness, order a commission to issue for the examination of such witness, on interrogatories or otherwise. If the witness be resident within the jurisdiction of the Court, the commission may issue to any person the Court may think fit to appoint. If beyond the jurisdiction, to the Court having jurisdiction at the place. By Section 176, Code of Civil Procedure, if the witness resides within the local jurisdiction of the High Court, the commission shall ordinarily be issued to the Small Cause Court. By Section 177, if the witness be a resident of some place beyond the jurisdiction of the High Court, but within the British territories in India, or within the territories of some allied State, commission shall be issued by the principal Civil Court of the district. By Section 178, if the witness reside

(*a*) *Nehal Mahton*, H. C., 3rd February, 1868.

beyond such territories, the High Court may issue the commission By Section 179, the commission, when executed, shall be returned to the Court issuing it, together with the depositions of the witnesses. But no deposition taken under a commission shall be read without the assent of the party against whom the same may be offered, unless it be proved that the deponent is beyond the jurisdiction of the Court, or dead, or unable from sickness or infirmity to attend, or distant, without collusion, more than 100 miles from the place where the Court is held, or exempted by reason of rank or sex from personal attendance, unless the Court shall dispense with proof of these circumstances. Commissions cannot be issued to examine convicts in jail. If the Magistrate refuses to allow their attendance, their evidence cannot be taken at all (*a*). Criminal prisoners cannot be suffered to appear in Civil Courts without the express order of Government (*b*). If the attendance of a Civil prisoner is necessary, the Court shall issue a writ to the officer in charge of the jail, calling on him to make over the prisoner to an officer of the Court, who shall be responsible for his safe custody (*c*).

Of Commissions to make local enquiries.—By Section 73, Act X, "The Collector may, at any stage of a case, cause a local enquiry and report respecting the matter in dispute to be made by any officer subordinate t him, or by any other officer of Government, with the consent of the authority to whom such officer is subordinate, or may himself proceed to the spot and make such local enquiry in person. The provisions of the law for the time being in force, relative to local enquiries by *Amins* or Commissioners under orders of the Civil Court, shall apply to any local enquiry made by any officer under this Section, and, so far as they are applicable, to enquiries made by the Collector in person. In the latter case, the Collector, after completing the enquiry,

(*a*) H. C. Letter No. 3185, 12th September, 1865.

(*b*) G. O. No 217T, 31st July, 1862, and No 2088, 18th March, 1863.

(*c*) H C Circular No 45, 1866, G O., 20th July, 1866

shall record on the proceedings such observations as appear to him appropriate, and the observations so recorded shall be received as evidence in the suit." The rules for local enquiries are given in Section 180, Code of Civil Procedure. This Section empowers a Commissioner to call for evidence, and parties or witnesses failing to attend are subject to the penalties before set forth (*a*). His report is to form part of the record, and he may be examined personally. By Section 181, Code of Civil Procedure, Commissioners may be appointed to investigate and adjust accounts. By Section 182, Code of Civil Procedure, the Court may order the expenses to be deposited before issue of the commission. The Court has a discretion to grant or refuse a local enquiry, and no special appeal lies from an order granting or refusing one (*b*). An *Amin*, unless specially authorised to do so, cannot receive documents (*c*). An *Amin's* report is sufficient evidence to support a decree if the Court believes it (*d*). An unpaid apprentice is not an officer subordinate to the Collector within the meaning of this Section (*e*). The Board have ruled that the instructions given to an *Amin* should be precise; the exact nature of the enquiry to be held, the means to be had recourse to in making it, and the time it should occupy must be recorded; the date of commencement of the enquiry must be specified, and the *Amin* will not defer his proceedings on account of the absence of a party to whom notice has been given. The simple attestation of an *Amin's* report does not preclude objections to it. By Act XII, 1856, Section 7, the daily fee is Rs. 3; the whole expenses must be levied before the commission is issued, *viz.*, the daily fee, the travelling expenses, the pay of peons, and the cost of postage;

(*a*) See *Eshan Chunder Chucketbutty*, H. C., 21st July, 1862.

(*b*) *J. Graham*, I, W. R, 141.

(*c*) *Gul Muhammad*, H. C., 6th July, 1866.

(*d*) *Sita Ram Mukherjya*, H. C., 28th June, 1866. See *Gaddadhur Banarjya*, H. C., 6th April, 1866.

(*e*) *Durga Dass Chaterjya*, H. C, 14th September, 1866.

the *Amin* is to be supplied with stationery by the Court. *Amins* should be rarely employed (*a*). The Sudder Court observed that it is only for the purposes of making local investigations that Commissioners are deputed, and therefore all the main facts in the case should be established by evidence taken in the case itself (*b*). An *Amin* cannot delegate his duties (*c*).

Of judgment and decree.—(Sections 183-198, Code of Civil Procedure.) By Section 15, Act VI, 1862, B. C., "the Collector shall pronounce judgment in all cases tried under this Act or Act X, 1859, in open Court. The judgment shall be written in the vernacular language of the Collector, and shall contain the reasons for the same, and shall be dated and signed by the Collector at the time when it is pronounced; provided that if the vernacular language of the Collector be not English, and he be sufficiently conversant with the English language to be able to write a clear and intelligible decision in that language, and prefer to write his judgment in it, the judgment may be written in English." By Sections 185 and 186, Code of Civil Procedure, the judgment shall contain the point or points for determination, the decision thereupon, and the reasons for the decision, and the Court shall state its decision on each issue, unless the finding upon one issue shall be sufficient for the decision of the suit. The whole of the judgment is to be read out in Court according to the Board's Rules, Chapter XII, Section 11, and due notice must be given of the date on which judgment will be given. The judgment and the decree are separate documents.

In preparing the decree, the provisions of Section 189, Code of Civil Procedure, should be followed (*d*); *viz.*, "the decree shall bear date the day on which judgment was passed. It shall contain the number of the suit, the names and descriptions of

(*a*) Board's Rules, Chapter XVI, Section 4.

(*b*) S. D. Circular, 4th February, 1840.

(*c*) S D., 1850, 290.

(*d*) Board's Rules, Chapter XVI, Section 3, Clause 1.

the parties, and particulars of the claim as stated in the register of the suit, and shall specify clearly the relief granted or other determination of the suit. It shall also state the amount of costs incurred in the suit, and by what parties, and in what proportions, they are to be paid, and shall be signed by the Judge and sealed with the seal of the Court." A decree wrongly drawn up must be corrected by the Court passing it (*a*). A manifest error in a decree, such as making costs payable by the winning party, may be corrected by the Court which passed the decree (*b*). In a rent suit, the decree should not direct in what way execution is to issue (*c*). By Section 10, Act XXIII, 1861, interest may be awarded on the principal claim from date of suit to date of decree, and from that date to date of payment, on the total amount decreed. By Section 194, Code of Civil Procedure, the decree may direct payment by instalments, but ordinarily, the creditor is not bound to accept payment by instalments (*d*).

As to costs, Section 188, Code of Civil Procedure, provides that under this denomination are included the whole of the expenses necessarily incurred by either party on account of the suit, and in enforcing the decree passed therein. such as the expense of stamps, of summoning the defendants and witnesses, and of other processes, or of procuring copies of documents, fees of pleaders, charges of witnesses, and expenses of Commissioners Section 14, Act VI, 1862, B. C., provides that " in awarding costs to either party, it shall be competent to the Collector to award to such party, on account of the fees of any agent or *Mukhtar* employed by him, such a sum not exceeding the rate of fee chargeable under the provisions of [Section 37, Act XX, 1865] as the Collector may direct." The Board have ruled

(*a*) *Bussiun*, VI, W. R, Miscellaneous, 123.

(*b*) R. S. C., 15th July, 1841.

(*c*) *Syama Churn Chuckerbutty*, II C., 4th August, 1862.

(*d*) *Kanhaia Singh*, II. C., 7th January, 1867.

under this Section that if a pleader be employed, and his employment be necessary, he shall receive full fees. If a revenue agent be employed, or a pleader unnecessarily, he shall receive three-quarter fees only. If the amount decreed does not exceed Rs. 5,000, the full fee is to be 5 per cent. on the amount, and on any excess above Rs. 5,000 up to Rs. 20,000 2 per cent. In suits for *pottahs* and *kabuliyuts*, abatement or enhancement, ejectment or re-instatement, the fee is to be calculated on the valuation of the claim, or upon such amount, not exceeding the valuation, as the Court may fix. If a suit be dismissed for default or on the merits, the defendant's pleader's fee shall be calculated on the whole value of the suit. If any suit be decreed only in part, the fees allowed to each party's pleader shall be calculated upon the value of that part of the claim in respect of which he has succeeded. When a suit for damages is decreed in part, the defendant shall not be entitled to any pleader's fee unless the amount claimed was excessive. When several defendants make a common defence and succeed, ordinarily only one pleader's fee shall be allowed, which shall be awarded to one pleader or apportioned by the Court. If the defences are separate and distinct, and the defendants have separate pleaders and separate interests, and succeed, a separate fee for each of such defendants is to be allowed, and is to be calculated upon the value of the separate interests. The fee in miscellaneous proceedings is Rs. 4 to 16 for appearance in the Collector's Court, and Rs. 1 to 10 in the Court of a Deputy Collector. In any suit or claim in a Court of original jurisdiction, which is undefended, the fee shall be one-half the ordinary fee. In revivals or re-hearings, the fee of the successful party's pleader shall be one-half the ordinary fee. This is irrespective of the fee for the original case. The same rules apply to appeals. When the interest of several appellants is joint, only one pleader's fee shall be ordinarily allowed, which shall be awarded or apportioned by the Court. When there are several respondents, the rule laid down for several defendants

shall be followed. The Court has a discretion to vary these rules (*a*). When *pro formâ* defendants properly impleaded are exempted from the decree, they are entitled to recover costs from the plaintiff (*b*). Parties impleaded unnecessarily are entitled to their costs (*c*). An appeal will lie upon a question of costs, but any interference with the Lower Court's order ought to be made with discretion (*d*). Where a suit is dismissed for want of jurisdiction, the Court has power to give costs (*e*). Costs carry interest, whether so expressed in the decree or not (*f*). If a judgment-creditor abstains upon certain conditions from executing a decree, he can subsequently enforce the conditions in the Civil Courts (*g*).

As to translating the judgment.—Section 185, Code of Civil Procedure, provides that the judgment shall be translated, and Section 198, Code of Civil Procedure, that certified copies of the judgment and decree shall be given to the parties or their pleaders on application on a one anna stamp, and on production of the necessary stamps. The Government have ruled that judgments in rent suits must be translated, and certified copies given according to these Sections. Translations are to be paid for at the rate of Rs. 2 per 100 words (*h*). The presiding officer is to note on the decree the date on which he signs it, and on certified copies the dates when they are furnished (*i*). Copy of any

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(*a*) Board's Rules, Chapter XII, Section 5.

(*b*) *Bithal Nath*, N. W. P., 7th January, 1865.

(*c*) *Collector of Dacca*, II, W. R., 53.

(*d*) *Giridhari Lall*, F. B. VI, W. R., 187.

(*e*) *Punchanun Ghose*, I, Indian Jurist, 38.

(*f*) *Haradhan Sandyal*, II, W. R., Miscellaneous, 25.

(*g*) *Aghar Chunder Mukherjya*, H. C., 23rd February, 1867.

(*h*) Board's Rules, Chapter XVI, Section 3.

(*i*) Board's Rules, Chapter XII, Section 2, Clause 19. He will be held responsible if the decree is not drawn up, and if copies are not furnished in due time.

decree or order having the force of a decree when passed by any Revenue Court requires an eight anna stamp, if the claim be for Rs. 50 or less, and a one rupee stamp, if the claim exceed Rs. 50 in value. Copy or translation of a judgment or order not having the force of a decree is chargeable with a stamp of 4 annas or 8 annas, according to the value of the claim. Act IV, Schedule B (*a*).

As to registration of decrees. When any registered document or any immoveable property is affected by the decision, a memorandum in the form given in the Board's Rules must be sent to the Registrar, under Section 41, Act XX, 1866. An order which only rejects a claim need not be notified to the Registrar (*b*). By Section 43, Act XX, 1866, the costs of registration, a scale of which is given in the Board's Rules, shall be costs in the case, and shall be paid by the Court to the Registrar. The North-Western Board has ruled that in all suits under clause 5, Section 23, Act X, 1859, in which a decree for the ejectment of a farmer or the cancelment of a lease is given, notice should be sent to the Registrar (*c*).

V.—Execution of Decrees.

Execution of decrees.—(Sections 149–206, Code of Civil Procedure). By Section 80, Act X, if the person required by the decree to grant a *pottah* refuse to do so, the Collector shall grant one. By Section 81, if the person required by the decree to grant a *kabuliyat* refuse to do so, a copy of the decree shall have the force of a *kabuliyat*. By Section 82, decrees for ejectment or re-instatement of ryots shall be executed by giving possession, and, if necessary, the Magistrate may be

(*a*) Board's Rules, Chapter XVI, Section 1, Clause 9 (issued in September, 1867).

(*b*) Board's Rules, Chapter XII, Section VI. But it is otherwise when an Appellate Court reverses a judgment, decreeing a claim N. W. P., Circular 16, 1866.

(*c*) Rent Rules, 27.

applied to for assistance. By Section 83, decrees for cancelment of a farmer's lease or ejectment or re-instatement of farmers shall be executed by proclaiming their purport. These Sections are given in full under the heads of "Suit for *pottah*," &c. When there was a condition that the rent should be applied in satisfaction of a bond executed by the lessor in favor of the lessee, and a decree for the rent was given, it was executed by directing an endorsement on the bond as directed in the decree (*a*). Section 206, Code of Civil Procedure, provides that all monies payable under a decree shall be paid into the Court whose duty it is to execute the decree. No adjustment of a decree, in part or in whole, shall be recognised by the Court unless such adjustment be made through the Court or be certified to the Court by the decree-holder. It has been lately ruled that this Section does not apply to Act X suits (*b*). By Section 85, Act X, "If the judgment-debtor have given security for his appearance and be not present when judgment is pronounced, and the surety shall fail to deliver him into custody when required so to do, process of execution may be taken out against the surety in the same manner as if a decree for the amount due by the debtor had been passed against the surety. If the decree be for the delivery of papers or accounts, and the defendant be not present when judgment is pronounced, and the surety shall fail to deliver him into custody when required to do so, execution may be taken out against the surety for the sum due under the bond, in the same manner as if a decree for that sum had been passed against the surety." When a decree is silent as to interest, the Court executing it cannot award interest (*c*), but the High Court have since ruled otherwise (*d*).

(*a*) *Goluknath Ras*, II. C, 16th August, 1866.

(*b*) Board's Circular 18 of May, 1868; *Ram Chunder Ras*, II. C., 24th March, 1868, over-ruling Board's Rules, Chapter XVI, Section 3, Clause 8.

(*c*) *Modusudon Lall*, F. B., VI, W. R, Miscellaneous, 109.

(*d*) *Ishwar Chunder Singh*, III, W. R, 7.

Application for execution.—(Section 207-215, Code of Civil Procedure). By Section 17, Act VI., 1862, B. C., "Process of execution may be issued against either the person or the property of a judgment-debtor, but process shall not be issued simultaneously against both person and property. It may be issued on the oral application of the judgment-creditor, his agent, or *Mukhtar*, made at the time the judgment is pronounced, or thereafter, upon the written application (on a one or eight anna stamp) of the judgment-creditor, his agent, or *Mukhtar*, presented to the Court by which the judgment was given. Process of execution shall be in the form (E.) or the form (F.) contained in the Schedule to Act X, 1859, or in a form as nearly resembling those forms as the circumstances of the case may admit." An application for execution of decree need not be accompanied by a copy of the decision (*a*). By Section 37, Act X, "Any moveable property required to be seized under an execution shall, if practicable, be described in a list to be furnished by the judgment-creditor, but if the creditor is unable to furnish such list, he may apply for a general attachment of the debtor's effects to the amount of the judgment and costs. In either case the property to be seized shall be pointed out to the officer entrusted with the execution of the process by the creditor or his agents."

The Bombay Court (18th July and 2nd October, 1860), has held that the salary of a Government servant is not attachable as such, but only after it has become a debt.

The right of a Shebait (*b*), a right of suit (*c*), a pension granted by Government (*d*), *Wukf* property (*e*), soldier's pay (*f*),

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(*a*) *Dhanpat Singh*, H. C., 9th January, 1869.
(*b*) *Juggernath Rai Chaudhari*, VII. W. R., 266.
(*c*) *Chunderkunt Bhuttacharjya*, H. C., 5th August, 1868.
(*d*) *Hadji Muhammad Kuzilbash*, VII, W. R., 169, Constr 788.
(*e*) Constr. 1166.
(*f*) Constr. 1177, 902, Madras H. C., 1st March, 1861.

and decrees of the same Court (*a*) cannot be attached in execution of decree. Heirs applying for execution do not require certificates under Act XXVII, 1860 (*b*). The transferree of a decree may apply for execution (*c*).

Limitation.—Section 92, Act X, provides that no process of execution of any description whatever shall be issued on a judgment under this Act after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding Rs. 500, in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of Civil Courts. Section 20, Act XIV, 1859, provides that no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment or to keep the same in force within three years next preceding the application for such execution. Summary decrees under the former Regulations cannot be executed since the repeal of those Regulations (*d*). The value of the stamps necessary for enforcing execution of a decree is, with reference to Section 188, Code of Civil Procedure, a portion of the costs, and if the judgment is thereby augmented to a sum above Rs. 500, the three years' limitation of Section 92 will not apply (*e*). If the application for execution is presented within the three years it is in time, notwithstanding that the warrant cannot issue till after the expiration of the

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(*a*) *Ram Chunder Rai*, H. C., 24th March, 1868.

(*b*) *Syad Thoyan Hossain*, H. C., 15th May, 1865. *Radha Gopal Singh*, 15th April, 1867.

(*c*) *Binod Behari Mukharjya*, H. C., 5th April, 1866, Section 208, Code of Civil Procedure.

(*d*) *Gopal Singh*, H. C., 2nd May, 1867, but see Section 1, Act X, 1859.

(*e*) R. C., *Bell Campbell*, H. C., 25th July, 1866. In this case it was ruled that no appeal lay from an order of a Deputy Collector directing issue of execution after the three years.

three years (*a*). When there has been an appeal, the three years are to be counted from the date of the appellate decree (*b*). Refusal of an application for review does not give a fresh start in counting the limitation (*c*). There have been numerous decisions as to what is a "proceeding keeping the decree in force."

When a Deputy Collector rejected an application for execution, on the ground that the decree had been satisfied, it was held the order was not appealable, nor could it be reviewed by the Deputy Collector himself (*d*). A Deputy Collector has power to enforce restitution of an amount levied in excess of the decree as finally settled in appeal, and the High Court can compel the exercise of this power under Section 15 of the charter (*e*).

Measures preliminary to issue of warrant.—(Sections 216-220, Code of Civil Procedure.) By Section 90, Act X, "Process of execution shall not be issued upon any judgment, without previous notice to the party against whom execution is applied for, if, when application for the issue of the process is made, a period of more than one year shall have elapsed from the date of the judgment, or from the date of the last previous application for execution." By Section 91, "Execution on a judgment shall not issue against the heir or other representative of a deceased party, without notice to such heir or other representative to appear and to be heard." Section 11, Act XXIII, 1861, allows the court to decide all questions arising between the parties to the suit relating to money paid in satisfaction of the decree and execution of the decree, and such orders are open to

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(*a*) *Hira Lall Sil*, H. C., 22nd September, 1866

(*b*) *Shaikh Fazl Iman*, H. C., 25th January, 1866, See *Hari Bangshi Banarjya*, H. C., 16th July, 1866.

(*c*) *Chowdhry Jummeejoy Mullick*, H. C., 9th May, 1866. As to whether admissions by the debtor give a fresh start the decisions are contradictory

(*d*) *Partab Chunder Singh*, H. C., 15th May, 1865. But see *Hera Lall Sil*, 22nd September, 1866

(*e*) *Gobind Kamar Chaudhary*, H. C., 31st May, 1867, F B.

appeal. But this is not applicable to suits under Act X, though, of course, such questions have often to be decided. The fact that an appeal is pending is no reason for refusing to execute the decree (*a*). When a decree is sought to be executed against the heirs of the judgment-debtor, it must be proved that the heirs are in possession of property derived by inheritance from the judgment-debtor. By Section 338, Code of Civil Procedure, execution of decrees shall not be stayed by reason of an appeal having been preferred. But, upon sufficient cause being shown, and on security being given, the Appellate Court may stay execution, or if, application for execution be made before the time allowed for appeal has expired, and the Lower Court has not received intimation of an appeal having been preferred, the Lower Court may stay execution. It is essential to the success of such an application, 1st, that an irreparable injury will result to the applicant, unless the delay be granted; 2nd, that the party applying has come promptly to make the application (*b*).

Issue of warrant.—(Section 221 or 222, Code of Civil Procedure. By Section 88, Act X, every warrant of execution shall bear date on the day on which it is signed by the Collector, and shall continue in force for such period as the Collector may direct, not being more than 60 days calculated from such date." By Section 89 " Second and successive warrants of execution may be issued by order of the Collector, on the application of the judgment-creditor after the period fixed for the continuance in force of a previous warrant." A court cannot, in executing a a decree for money, without the consent of the decree-holder, allow the amount to be paid by instalments (*c*).

Of arrest and imprisonment in execution of decrees for money.—(Sections 273-282, Code of Civil Procedure). By Section 84, Act X, " If the decree be for arrears of rent, or for money, paper,

(*a*) *G. Gregory*, H. C., 8th April, 1864.

(*b*) *Siddhi Nuzur Ali Khan*, P. C., 29th November, 1865.

(*c*) *J. Smith*, N. W. P., 2nd September, 1863.

or accounts, and the defendant has been committed to jail, or appears pursuant to the conditions of any security bond given under Section 51, the Collector may order that he be detained in or committed to the civil jail, unless he immediately pay into court the amount of the decree with costs, or otherwise comply with the terms of the decree." By Section 93, Act X, "If a warrant issue for taking in execution the body of any person, the officer charged with the execution of the warrant shall bring him, with all convenient speed, before the Collector. If such person shall not then deposit in court the full amount specified in the warrant, or make such arrangement for the payment of the same as shall be satisfactory to the judgment creditor, or satisfy the Collector that he has no present means of paying the debt, the Collector shall send him to the civil jail, there to remain for such time as shall be directed by a warrant addressed to the keeper of the jail, unless he shall, in the meantime, pay the full amount for the payment of which he is liable under the decree. Provided that the time for which a debtor may be confined in execution of a decree under this Act, shall not exceed three calendar months, where the amount decreed, exclusive of costs, does not exceed Rs. 50, or six calendar months when such amount does not exceed Rs. 500, or two years in any other case. If the decree against any person arrested under a warrant be for the delivery of papers or accounts, and the persons or accounts shall not be delivered by him when he is brought before the Collector, such person may be committed to the civil jail, there to remain for such time not exceeding six calander months as the Collector shall direct, unless he shall in the meantime deliver the papers or accounts according to the terms of the decree." Under this Section the Collector has the power of fixing the term of imprisonment, and is bound to do so (*a*). On being brought up under a warrant, the defendant may be discharged if he satisfies the Collector that he has no present means of payment. Section

(*a*) R. B., 2nd November, 1867.

273, Code of Civil Procedure, provides for release, either on this ground or on the ground that the defendant is willing to make over all his property to the Court, and Sections 280-282, Code of Civil Procedure, provide that a similar application may be made at any time during the imprisonment, on the defendant making over all his property. But these Sections have not been extended to Act X suits. By Section 94, "Any person once discharged from jail shall not be imprisoned a second time under the same judgment. If the amount due do not exceed Rs. 100, the Collector may declare such discharged person absolved from further liability under that decree. In other cases the discharge shall not extinguish the liability of the discharged person under the decree, or exempt any property belonging to such person from attachment, in execution of the same." By Section 95, "Any person applying for a warrant of arrest under Section 49, or suing out process of execution against the body of any person, shall deposit in Court at the time of issue of the warrant diet money for one month of 30 days, at such rate as the Collector may direct, not exceeding two annas *per diem* unless the Collector, for any special reason, direct that deposit be made at a higher rate, which shall not exceed four annas *per diem*" By Section 96, Act X, "Payment of diet money at the same rate shall be made previously to the commencement of each succeeding month of the imprisonment, in failure of which the party confined shall be discharged." By Section 97, "All diet-money spent in providing subsistence for any prisoner, shall be added to the costs in the suit; any diet money not so spent shall be returned to the person who deposited the same." Native women of rank are not exempt from arrest in execution (*a*) any more than European or Eurasian women (*b*).

Of attachment of moveable property in execution of decrees for money.—(Sections 232-245, Code of Civil Procedure). By

(*a*) *Maharani of Burdwan*, H. C., 6th August 1868, F. B.

(*b*) *J. Davis*, H. C., 22nd August, 1867.

Section 98, Act X, "In executing a writ of execution against the moveable property of a debtor liable under this Act the officer charged with the execution of the writ shall prepare a list of the property pointed out by the judgment-creditor, and shall publish a proclamation specifying the day upon which the sale is intended to be held, together with a copy of the said list, at the intended place of sale, and at the residence of the debtor. A copy of the said proclamation and list shall be transmitted to the Collector, and shall be affixed in his office." Sections 232-239, Code of Civil Procedure, prescribe the mode in which attachment of different kinds of property is to be made. It has been ruled that huts are not moveable property (*a*).

Of claims to attached property.—(Sections 246-247, Code of Civil Procedure). By Section 100, Act X, "If before the day fixed for the sale a third party appear before the Collector, and claim a right or interest in any of the moveable property taken in execution, the Collector shall examine such party or his agent on oath or affirmation, or otherwise, according to the law for the time being in force relative to the examination of witnesses, and if he see sufficient reason for so doing may stay the sale of such property. By Section 101, "The Collector shall adjudicate upon such claim, and make such order between the claimant and the plaintiff and defendant in the original suit, as shall seem fit. In trying such claim the Collector shall be guided by the rules contained in this Act so far as they may be applicable." By Section 102, "If the claimant shall fail to establish his right to the property taken in execution the Collector at the time of disposing of the case may award to the judgment-creditor against such claimant, as part of the costs, such sum as he may consider sufficient to cover any loss of interest or damage which the judgment-creditor may have sustained, by reason of the postponement of the sale

(*a*) *Ray Chunder Bose*, H. C, 28th November, 1868.

of the property." By Section 103, "No appeal shall lie from any order passed by the Collector under the two last preceding Sections. But the party against whom the same may be given shall be at liberty to bring a suit in the Civil Court to establish his right at any time within one year from the date of the order; provided that if the order be for the sale of the property, the suit shall not be for the recovery of the property, but shall be for damages against the judgment creditor, by whom the property was brought to sale." Under Section 246, Code of Civil Procedure, if it shall appear that the property was not in possession of the judgment-debtor, or in the possession of some other person in trust for him, or that being in his possession it was held by him in trust for some other person, the property shall be released. The mere fact that the property is held in the name of another than the judgment-debtor is no reason for releasing the property, if that other be holding it in trust for the judgment-debtor, as Section 205, Code of Civil Procedure, provides for the attachment and sale of all property belonging to the judgment-debtor, whether held in his own name or by another in trust for him.

Of sales of moveable property in execution.—(Section 248-272, Code of Civil Procedure). By Section 49, Act X, "No sale of any moveable property taken in execution shall be made until after the end of ten days next following the day on which such property may have been so taken. Until such sale the property shall be deposited in some fit place; or it may remain in custody of some fit person approved by the officer executing the writ. The provisions of Sections 129 to 133, so far as the same are applicable, shall be applied to sales under this Section." By Section 129, "The sale shall be held at the place where the distrained (attached) property is deposited or at the nearest *ganj*, *bazaar*, *hát*, or other place of public resort, if the Civil Court *Ameen* or other officer should be of opinion that it is likely to sell them to better advantage

The property shall be sold by public auction in one or more lots, as the officer holding the sale may think advisable; and if the demand with the costs of distress (attachment) and sale be satisfied by the sale of a portion of the property, the distress (attachment) shall be immediately withdrawn with respect to the remainder." By Section 130, "If on the property being put up for sale, a fair price, in the estimation of the officer holding the sale be not offered for it, and the owner of the property, or some person authorised to act on his behalf, apply to have the sale postponed until the next day, or the next market day, if a market be held at the place of sale, the sale shall be postponed until such day, and shall be then completed at whatever price may be offered for the property." By Section 131, "The price of every lot shall be paid for in ready-money at the time of sale, or as soon after as the officer holding the sale shall think necessary; and in default of such payment the property shall be put up again and sold. When the purchase money has been paid in full, the officer holding the sale shall give the purchaser a certificate describing the property purchased by him and the price paid." By Section 132, "From the proceeds of the sale of (distrained) attached property, the officer holding the sale shall make a deduction at the rate of one anna in the rupee, on account of the costs of the sale, and shall transmit the amount to the Collector, in order that it may be credited to Government. He shall then pay to the distrainer (judgment-creditor) the expenses incurred by him on account of the distress (attachment) and of the issue of the notice and proclamation of sale prescribed in Section 124, (proclamation of sale prescribed in Section 98) to such an amount as, after examination of the statement of expenses furnished by the distrainer, (judgment-creditor), he shall think proper to allow. The remainder shall be applied to the discharge of the arrear for which the distraint (decree) was made with interest thereon up to the day of sale and if there be any overplus it shall be delivered to the persons whose property shall have been sold." By Section 133

"Officers holding sales of property under this Act, and all persons employed by or subordinate to such officers are prohibited from purchasing, either directly or indirectly, property sold by such officers." The Board have ruled that these sales should be held by the *Nazir*. Civil Court *Amins* should be employed as rarely as possible. The *Nazir* may depute his *Naib* to hold sales, but not a mere *peon*. He may be allowed his travelling and other actual expenses, which will be paid by Government. The one anna in the rupee is all that can be levied from the parties (*a*). The Board have ruled that the issue and service of execution and other processes should not be interrupted in any way in consequence of the closure of the Civil Courts (*b*). If the sale be postponed, a fresh proclamation is necessary (*c*). Section 270, Code of Civil Procedure, provides that when property is sold in execution of decree, the attaching creditor shall be first paid, and by Section 271, the surplus is to be rateably distributed among the decree holders who have taken out execution prior to the order for distribution. By Section 104, Act X, "No irregularity in publishing or conducting a sale of moveable property under an execution shall vitiate such sale; but this rule shall not be held to deprive any person, who may sustain damage by reason of such irregularity, from recovering such damage by action in the Civil Court, provided such action be brought within one year from the date of sale." A sale should not be set aside for irregularity alone without proof of damage (*d*). The decree-holder will not always be the party liable to make good the damage (*e*).

Of sales of transferable tenures in execution of decrees for rent

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(*a*) Board's Rules, Chapter XVI, Section V.

(*b*) Board's Rules, Chapter XVI, Section XI, Clause 2. But an execution sale by a Civil Court on a holiday is illegal.—*Hurro Jemadar*, II, W. R., Miscellaneous, 24.

(*c*) *Shoshi Muki Brahmini*, VI, W. R, Miscellaneous 84.

(*d*) *Brinda Deby Dassya*, VI, W. R, Miscellaneous 82.

(*e*) *Ram Chunder Surma Chuckerbutty*, H. C., 28th March, 1867.

due in respect thereof.—By Section 105 Act, X, "If the decree be for an arrear of rent due in respect of an under-tenure, which, by the title deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force. But no such application shall be received, when a warrant of execution has been previously issued against the person or moveable property of the judgment-debtor, so long as such warrant remains in force. If, after the sale of an under-tenure, any portion of the amount claimed remains due, process may be applied for against any other property, moveable or immoveable, belonging to the debtor, and any such immoveable property may be brought to sale in the manner provided in Section 110 of this Act. By Section 108, Act X, "If a decree is given in favor of a sharer in a joint undivided estate, dependent *taluk*, or other similar tenure, for money due to him on account of his share of the rent of an under-tenure situated in such undivided estate, or *taluk* or tenure, application for the sale of such under-tenure shall not be received unless execution shall have been first taken out against any moveable property which the judgment-debtor may possess within the district in which the suit was instituted, and the sale of such property, if any, shall have proved insufficient to satisfy the judgment. In such case, such under-tenure, if of the nature described in Section 105, may be brought to sale in execution of the decree in the same manner as any other immoveable property may be sold in execution of a decree for money, under the provisions of the two next following Sections." When a Deputy Collector sold an under-tenure to satisfy a sharer's decrees without first issuing process against the moveable property, it was held that no appeal lay (*a*).

(*a*) *Dokauri Kazi*, H. C., 27th August, 1866, F. B. This was before the passing of Act VIII, 1865, B. C.

Of claims to under-tenures.—By Section 106, Act X, "If before the day fixed for the sale of any such under-tenure as aforesaid, in execution of a decree for arrears of rent due in respect of such under-tenure, a third party appears before the Collector and alleges that such third party, and not the person against whom the decree has been obtained, is the proprietor of such under-tenure, and was in lawful possession of the same at the time when such decree was obtained, the Collector shall examine such party in the manner provided in Section 100 for the examination of third parties, and if he see sufficient reason for so doing, and such party shall deposit in Court the amount of the decree, or give sufficient security for the same, the Collector shall stay the sale, and proceed to enquire into and adjudicate upon the claim. Provided that no transfer of an under-tenure which by the provisions of this Act or any other law for the time being in force, is required to be registered in the *sherista* of the *zamindar* or superior tenant, shall be recognised, unless it have been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector". The rulings as to registration and transfer have already been given in Chapter VI. By Section 107, "In trying such claim the Collector shall be guided by the rules contained in this Act so far as the same may be applicable; and the judgment passed by the Collector on such claim shall not be subject to appeal, but the party against whom it is given may bring a suit in the Civil Court to establish his right within one year from the date of the judgment."

Sale Procedure.—By Section 4, Act VIII, 1865, B. C., "When an application for the sale of an under-tenure liable under Section 105, Act X, shall have been made and allowed, the Collector (*a*), in whose Court the decree is in course of execution shall thereupon cause to be hung up in his own Court and in that of the Collector and Judge of the District

(*a*) By Section 1 of the Act, the word "Collector" includes all officers exercising the full powers of a Collector of a District.

within which the land comprised in the under-tenure be sold is situated, and to be affixed on some conspicuous place on the land, and in the town or village nearest to which the said land is situated, a notice for the sale of the said under-tenure on some fixed date not less than twenty days from the hanging up of the said notice in the Court in which the decree is in course of execution." By Section 5, "The said notice shall specify in the words used in the plaint in the suit in which the decree was made, the name of the village, estate, and pergunnah or other local division in which the land comprised in the said under-tenure is situated, the yearly rent payable under the said under-tenure, and the gross amount recoverable under the said decree." Section 6 provides that the sale shall be stopped if the amount of decree, interest, and costs be paid into Court by any person interested in the protection of the under-tenure, and the provisions of Section 13 Regulation VIII, 1819, shall apply to such payments (*a*). By Section 7, "The under-tenure shall be sold to the highest bidder in open Court." By Section 8, "The party who shall be declared to be the purchaser shall be required to deposit immediately in cash, or Government currency notes, 25 per cent. of the amount of his bid; and in default of such deposit, the under-tenure shall be put up again and sold forthwith, or on the next ensuing office day." By Section 9, "The full amount of the purchase money shall be made good by the purchaser before sunset of the eighth day from that on which the sale of the under-tenure took place, reckoning that day as one of the eight; or if the eighth day be a Sunday or other close holiday, then on the first office day after the eighth day; and in default of payment within the prescribed period as aforesaid, the deposit shall be forfeited to the Government, and the under-tenure shall be resold, and the defaulting purchaser shall forfeit all claims thereto, or to any part of the sum for which the said under-tenure may be subsequently sold. If the proceeds of the

(*a*) See Chapter V, "Staying" Cancelments.

sale which may be eventually completed be less than the price bid by the defaulting purchaser, the difference shall be leviable from him under the law for enforcing the payment of money in satisfaction of a decree for arrears of rent." By Section 10, the re-sale shall be conducted under the same rules. By Section 11, certificate and possession are to be given to the purchaser on payment by him in full of the purchase money. By Section 12, the proceeds of the sale are to be applied, first, to repay the judgment-creditor the necessary expenses incurred by him in procuring it; second, to satisfy the decree, and the residue is to be kept in deposit for the defaulter. By Section 13, "An appeal shall lie to the Collector from any proceedings of a Deputy or Assistant Collector if made within fifteen days, and to the Commissioner from any original proceedings of a Collector under this Act if made within thirty days from the date of the sale; but no proceedings under this Act shall be reversed or modified in appeal except upon the ground of irrelevancy of the law, or of such an irregularity in procedure as, in the opinion of the appellate authority, has caused injury to the interests of one of the parties to the suit in which the decree was passed." By Section 14 the Commissioner and Board may revise orders passed on appeal. By Section 15, if a sale be reversed the purchaser shall recover the purchase money in such manner as the appellate authority may direct, and such orders may be enforced by the process for recovery of arrears of rent. Section 16, providing for cancelment of under-tenure by sale of the superior tenure, has already been given in Chapter V. Section 17, obliges purchasers to register their names in the landlord's books within fifteen days from the date of sale, on pain of being sued for a *kabooliyut*.

If the tenure in respect of which an arrear has been decreed to be due be a putnee, Regulation I, 1820, directs that the sale in execution shall be held under the provisions of Regulation VIII, 1819, ten days' notice being given (*a*).

(*a*) See Chapter III, under "Summary Sale."

A tenant whose tenure has been sold in execution of a decree for rent accruing thereon cannot appeal or sue in the Civil Court to reverse the sale (*a*). But a third party claiming to be a purchaser of the tenure may sue (*b*), even though he did not intervene under Section 106, and though his name is not registered in the *zamindar's* books (*c*). The sale holds good notwithstanding the reversal of the decree in execution of which it is made (*d*).

Of sale of immoveable property in execution.—By Section 109, Act X, "In the execution of any decree for the payment of money under this Act, not being money due as arrears of rent of a saleable under-tenure (*e*), if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor within the district in which the suit was instituted, the judgment-creditor may apply for execution against any immoveable property belonging to such debtor."

If immoveable property be sold otherwise, a suit lies in the Civil Court to set the sale aside as it was made wholly without jurisdiction (*f*). A judgment-creditor having sold in execution lower rights than the debtor really possessed may sell the higher and true rights separately (*g*).

Claims to immoveable property.—By Section 111, Act X, "If before the day fixed for the sale, objection shall be offered

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(*a*) *Ratan Mani Dasya*, H. C., 16th March, 1864, *e. c.*, *Sarup Chundr Bhuttacharjya*, VI W. R., 55; *Jugol Kishore Banarjya*, H. C., 7th July, 1868.

(*b*) *Madan Lall*, H. C., 5th February, 1866, F. B.; *Amrit Lall Bose*, 24th March, 1865.

(*c*) *Mukta Kashi Debya*, H. C., 9th August, 1865, *Karu Lall Thakur*, 4th January, 1867.

(*d*) *Jan Ali*, H C., 8th June, 1868.

(*e*) But Section 105 provides for the sale of immoveable property to satisfy any balance of a decree unsatisfied by the sale of the tenure itself.

(*f*) *Janki Lall*, H C., 31st August, 1865.

(*g*) *Hanmanath Rai*, H. C, 5th January, 1867.

to the sale on the ground of such property not belonging to the judgment-debtor, and consequently not being liable to be sold in execution of a decree against him, the Collector shall examine the party making the objection in the manner prescribed in Section 100, and if satisfied that there is sufficient ground for so doing shall proceed to adjudicate as provided in Section 109."

Sale Procedure.—By Section 110, "If the immoveable property against which execution is applied for, be a house or other building, process shall be issued in the same manner as for the attachment and sale of moveable property, and the provisions of Sections 98 and 99 shall be applicable to the execution of such process.

If the property be a saleable under-tenure it shall be sold under the provisions of the law for the time being in force applicable to the sale of such under-tenures for demands other than those of arrears of rent due in respect thereof." This law is contained in Section 248, &c., Code of Civil Procedure (*a*). By Section 234, the property is to be attached by a written order prohibiting alienation, which, by Section 239, is to be fixed up in the Court-house and Collector's office, and a copy delivered or sent registered by post to the party in possession, and it is to be read aloud on the land. It has been ruled that no sale in execution under Act VIII., 1859, can take place without previous attachment, and if an execution case be struck off, the general rule is that the attachment falls in (*b*); but in a recent case the Chief Justice said that if a case be struck off without any fault on the part of the decree-holder the attachment remains in force (*c*). By Section 243, the sale is to be conducted by an officer of the Court, and is to be by public auction. By Section 249, a proclama-

(*a*) Board's Rules, Chapter XVI, Section 8, Clause 8.

(*b*) *Luchmeepat Singh*, H. C., 7th September, 1867.

(*c*) *Musst. Zahuran*, H. C., 19th November, 1868.

tion specifying the time and place of sale and the property to be sold, with any other necessary particulars, and declaring that the sale extends only to the right, title, and interest of the defendant therein, shall be made on the land by beat of drum, and a copy of it affixed in the Court-house, in the Collector's and Judge's offices, and in the town or village in which the attachment may have taken place (*a*). The sale shall not take place till the expiration of 30 days from the date of affixing the notification in the Court-house. By Section 253, at the sale the purchaser shall deposit 25 *per cent.* of the amount of his bid, and in default the property shall be re-sold forthwith. By Section 254, the balance must be paid by sunset of the fifteenth day from the day of sale, and in default, after defraying the expenses of the sale, the deposit shall be forfeited to Government, and the property re-sold, and the defaulter shall be answerable for any loss at the re-sale. By Section 255, a fresh notification is required before re-sale. By Section 256, no sale shall become absolute till it has been confirmed by the Court, and at any time within 30 days from the date of the sale application may be made to set it aside on the ground of material irregularity in publishing or conducting the sale which has caused substantial injury to the applicant (*b*). By Section 257, if no such objection be made or if it be disallowed, the Court shall pass an order confirming the sale. If the objection be allowed the order is final, if it be disallowed the order confirming the sale shall be open to appeal. The Board have ruled that this appeal should be heard by Collectors from the orders of Deputy Collectors,

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(*a*) This Section proceeds upon the assumption that the property has been already attached. *Dinonath Ruckit*, I Hyde, 168.

(*b*) The Agra Court has ruled that this Section does not apply to applications by third parties, but only to judgment-debtors. *Rai Setaram*, N. W P., 1862, 377.

and by Commissioners from the orders of Collectors (*a*). By Section 258, if the sale is set aside the price is to be returned to the purchaser. By Section 259, after a sale has become absolute a certificate is to be granted to the purchaser. By Section 260, the certificate is to state the name of the actual purchaser, and suits to oust him on the ground that he bought merely as an agent shall be dismissed with costs.

Section 160, Act X., further provides "that if the property be an estate or share of an estate it shall be sold under the rules in force for the sale of estates for the recovery of demands recoverable by the same process as arrears of land revenue. "This law is Act XI, 1859. The sale can only be held after special notification under Section 5 of the Act. The date fixed in the notification should be the latest date for payment of such demands in the District as determined by the Board of Revenue under Section 3. An appeal lies to the Commissioner under Section 25 of the Act, in case of any irregularities in the sale (*b*). The notification under Section 5, Act XI, does not operate as an attachment; and it is doubtful if any immoveable property need be attached prior to sale in execution of a decree under Act X (*c*).

A Collector has power to give possession to a purchaser at a sale held under Section 110, Act X (*d*). In this case it was further held that the Judge had jurisdiction to hear an appeal from an order of the Collector, referring the purchaser to a regular suit for possession. But when an estate was sold in execution, and appeal was made on the ground of irregularities producing substantial damage to the judgment-debtor, it was held that the Judge had no jurisdiction to hear an appeal. The appeal on this ground should have been preferred to the

(*a*) Board's Rules, Chapter XVI, Section 8, Clause 8.

(*b*) Board's Rules, Chapter XVI, Section 8, Clause 9.

(*c*) *Nuuku Ram*, II C, 20th April, 1868.

(*d*) *R. Solano*, II. C., 19th April, 1864.

Commissioner under Section 25, Act XI., 1859 (*a*). A Collector or Deputy Collector cannot set aside a sale held under his order, but if he does so, no appeal lies and no Court but the High Court acting under Section 35, Act XXIII., 1861, can interfere with his order (*b*). When a Deputy Collector amended a sale notice, by including therein the entire mehal, it was held that no appeal lay (*c*).

VI.—Of Appeals from Executive Orders.

By Section 151, Act X, "In the performance of their duties under this Act, the Collectors and Deputy Collectors shall be subject to the general direction and control of the Commissioners and the Boards of Revenue; and the Deputy Collectors shall be subject to the direction and control of the Collectors to whom they are subordinate. All orders passed by a Collector under this Act not being judgments in suits or orders passed in the course of suits and relating to the trial thereof, or orders passed after decree, and relating to the execution thereof, shall be appealable to the Commissioner, and all such orders passed by a Deputy Collector shall be appealable to the Collector; but no judgment of a Collector or Deputy Collector in any suit, and no order of a Collector or Deputy Collector passed in any suit, and relating to the trial thereof, or after decree, and relating to the execution thereof, shall be open to revision or appeal otherwise than as expressly provided in this Act." The portion of this Section relating to non-appealable orders agrees with Sections 363 and 364, Code of Civil Procedure, the former of which provides that any error, defect, or irregularity in any order passed in the course of the suit when it affects the merits of the case or the jurisdiction of the Court may be set forth as a

(*a*) *Sirdar Ghulab, Singh*, H C, 18th November, 1865

(*b*) *Adarmani Dasya*, H. C, 21st July, 1865, *Nobodurga Dasya*, 29th May, 1866, See *R. C. Bell, Campbell*, H. C, 25th June, 1866, *Dokowri Kazi*, 27th August, 1866. F B.

(*c*) *J Beckwith*, H C, 9th February, 1866.

ground of objection on appeal. Section 11, Act XXIII, 1861, however, allows an appeal from any order passed during execution of decree regarding questions arising between parties to the suit. As to these provisions the Board observe that there is no appeal from or power of revision of orders passed after decree compelling specific performance (Sections 80-83, Act X), but the superior executive authorities may point out irregularities. If decree is executed against the person or moveable property, there is no appeal but irregularities should be reported. Appeals are, however, allowed in the case of sales of under-tenures under Section 13, Act XIII, 1865, B. C., and under Section 257, Act VIII, 1859, and sales of estates under Section 25, Act X, 1859. There is no appeal form and no power of revision of any order passed after decree and relating to execution thereof upon the merits, except where a claim has been adjudicated. Unless an appeal is made to the proper authority, there is no power of interference by the superior authorities. It is only orders passed in appeal that can be revised by the Board, under Section 152 (*a*). The appeals cognizable under this Section are those from orders under Section 25 (*b*); Section 27 (*c*); Section 147 regarding resistance of process; and probably those under Section 145.

Procedure.—By Section 152, "Every appeal against the order of a Collector shall be presented to the Commissioner within 30 days, and every appeal against the orders of a Deputy Collector shall be presented to the Collector within 15 days from the date of the order. Orders passed in appeal by a Commissioner or a Collector shall not be open to any further appeal, but the Board of Revenue or the Commissioners may call for any case, and pass such orders thereon as they

(*a*) Board's Rules, Chapter XVI., Section 8.

(*b*) *C. J. Philippe*, H. C., 3rd June, 1863; *Ram Kumar Mukharjya*, S. D., 22nd August, 1861.

(*c*) *Mir Muhammad Taki Chandhari*, S. D., 17th June, 1861.

may think proper." An appeal presented by mistake to the Judge instead of the Commissioner, cannot be presented subsequently to the Commissioner if the thirty days have expired (*a*). An Appellate Court is bound to give reasons for its decisions, and to dispose of the objections of the party against whom it decides (*b*). When the interests of several parties to a suit are identical the cases of all may be disposed of on the appeal of one (*c*). An Appellate Court cannot decide a case upon an issue not tried in the Court of first instance (*d*). Section 19, Act VI, 1862, B. C., gives a Deputy Collector no power to hear an appeal even in a case referred to him by the Collector (*e*). But under Act IV, 1867, B. C., Deputy Collectors may now be vested with power to hear appeals. Petitions of appeal from executive orders require a stamp of 8 annas when presented to a Commissioner or Collector, and one of 2 Rupees when presented to the Board.

VII.—Of Appeals from Judgments and Judicial Orders.

Appeals to the Collectors.—By Section 153, Act X, "In suits under Clauses 2, 4, and 7 of Section 23, and under Section 24 of this Act, tried and decided by a Collector, if the amount sued for or the value of the property claimed does not exceed Rs. 100, the judgment of the Collector shall be final, and not open to revision or appeal except as hereinafter provided (in Section 154), unless in any such suit a question of right to enhance or otherwise vary the rent of a *ryot* or tenant, or any question relating to a title to land, or to some interest in land, as between parties having conflicting claims thereto, has been determined by the judgment, in which case the judgment shall be open to appeal in the manner provided in Sections 160

(*a*) *C. J. Philippe*, H. C., 3rd June, 1863.

(*b*) *Kazi Muhammad Zakir*, H. C., 23rd February, 1865.

(*c*) *Ram Chunder Chaudhari*, H. C., 25th September, 1863.

(*d*) *Ishwar Chunder Ghosal*, H. C., 20th August, 1864.

(*e*) *Kali Naraian Chaudhari*, H C., 7th September, 1866, F. B.

and 161, of this Act." By Section 155, "When any such suit as aforesaid, (in which, if tried and decided by a Collector, the judgment of the Collector would be final,) is tried and decided by a Deputy Collector, an appeal from the judgment of the Deputy Collector shall lie to the Collector." As to what is a question of right, &c., there have been numerous decisions. When the Lower Court found that the *ryot* had agreed to pay a higher rate, it was held that no question of right to vary the rent had been decided, and that the appeal lay to the Collector. In this case Mr. Justice L. S. Jackson said, "I think that the 'question of the right to vary the rent' is a question whether the tenant shall be called upon to pay, or the landlord to accept *irrespective of his own will*, a different rate of rent from that which has been formerly paid by agreement" (*a*). When the plaintiff sued on a *kabuliyat* which the defendant denied, pleading a *maurusi* holding at a lower rent, and the Deputy Collector decreed the case on proof of the *kabuliyat*, it was held the appeal lay to the Collector (*b*). There has been much conflict of opinion in regard to cases decided under Section 77. On the one hand it was said that a decision that a third party has been *bonâ fide* in the enjoyment and receipt of the rents from, before, and up to the date of suit, is a decision on a question relating to some interest in land as between parties having conflicting claims thereto, and therefore that the appeal from such a decision lay to the Judge, although the rent in dispute might be below Rs. 100 (*c*). But it has now been settled by a Full Bench, that the fact of the actual receipt of the rent previous to the suit which forms the subject of enquiry under Section 77, is totally unconnected with the legal title to, or any interest in the land,

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(*a*) *Anand Chunder Digra*, H. C., 16th July, 1867.

(*b*) *Hari Nath Ghose*, H C., 14th April, 1863.

(*c*) *Gopal Chunder Dass*, H. C., 10th September, 1863; *Kala Chand Chuckerbutty*, S. D., 26th June, 1862.

or with the right to receive the rent, and therefore the appeal from a judgment under Section 77 in a suit for Rs. 100 or less, lies to the Collector (*a*). But it has been held in several cases that if in such a suit a Deputy Collector goes into the question of title, and decides the legal right to receive the rent as between the plaintiff and the intervenor, the appeal lies to the Judge, and must be decided upon the proper issue under Section 353, Code of Civil Procedure, if the evidence upon the record is sufficient (*b*). When the defendant and intervenor denied the title of plaintiff's vendor, and alleged the *kubuliyat* on which the suit was based to have been extorted, and the Deputy Collector decided the question of title, it was held that Section 77 did not apply to this case, as the intervenor came in not upon the allegation of having been previously in receipt of the rent, but on the allegation that plaintiff had no title, and that even if an issue as to previous receipt of the rent had been laid down and decided against the intervenor, it would still have been necessary to go into the question of plaintiff's title, for he could not recover without proof of his title. In cases like this, an issue as to title is properly raised, and the appeal lies to the Judge (*c*). When the Deputy Collector tried the proper issue and decided the case thereon, incidentally making a remark as to the evidence of title put in by the intervenor, it was held that this was no determination on title giving the *ryot* an appeal to the Judge (*d*). When the intervenor alleged that the plaintiff's lessor was merely a *farzi* for the party from whom the (intervenor) inherited, and the Deputy Collector ruled that as she had attested the lease and consented to it, she could not object to it, and the Collector heard the appeal, the High Court,

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(*a*) *Syud Hamid-ud-din*, II. C., 26th May, 1865, F. B., *Bhagavati Dibye* S. D., 1st October, 1861.

(*b*) S. D., March, 1862. 73; *Bibi Janiran*, H. C., 12th June, 1865; *Punchanun Kunwer*, 7th August, 1865.

(*c*) *Gour Dass Byragi*, II. C., 9th January, 1867.

(*d*) *Shadu Churn Dadar*, II. C, 31st January, 1867.

set aside his order under Section 15 of the charter, as the appeal lay to the Judge (*a*). When A complained against the *zamindar* for wrongful distraint on the ground that he paid rent not to the *zamindar*, but to a *makurraridar* who intervened and supported his statement, and the *zamindar* justified the distraint by saying that not the plaintiff, but one *Ramzan* was the *ryot* in possession, and the Deputy Collector decided that the *zamindar* had the right to distrain whoever was in possession; the High Court held that the appeal lay to the Judge, and that the points for enquiry were, 1st, who was the *ryot* in actual possession, and 2nd, who was in actual receipt of the rent from that *ryot* (*b*). When A bought a *jotedari* tenure at a sale for arrears of rent, and alleging B to be the *kurpha ryot* in possession distrained the crops for arrears, and C thereupon sued A for damages on the allegation that he C was the *ryot* in possession holding under and paying rent direct to one *Bhowanishwari*, A's landlord, the High Court held that this case involved the decision of a question of "some interest in land between parties having conflicting claims thereto," as the plaintiff claimed to have an interest in the land from his lease from *Bhowanishwari*, and A claimed to have it from his purchase of the tenure. The appeal therefore lay to the Judge (*c*). When the plaintiff sued as purchaser of the 3d. 16c. share of one Bhuttoo, and the defendant pleaded that Bhuttoo's share was less than that claimed, that part of this land was held by other *ryots*, and that for the rest, he paid rent to an *ijaradar*, and the *ijaradar* did not appear, but the plaintiff admitted he received rent immediately through the *ijaradar*, and the Deputy Collector went into the question as to the amount of the plaintiff's share, and held that the deed of

(*a*) *Bhyrub Chunder*, H. C., 8th September, 1866.

(*b*) *Rai Chunder Surma Chuckerbutty*, H. C., 27th June, 1866.

(*c*) *Jogishwar Bhuttacharjya*, H. C., 22nd May, 1865, as to the power of Revenue Courts to try questions of title. See *Omachurn Dutt*, H. C., 6th January, 1866.

sale under which he claimed was a forgery; the High Court held that the Deputy Collector was wrong in going into the question of title, but as he had done so, the appeal lay to the Judge. On the Judge refusing to hear the appeal, the plaintiff appealed to the Collector who decided that he had not proved previous receipt of rent, and this decision was also held to be irregular, as the decision appealed against proceeded on a totally different matter; the Collector should have remanded the case for trial as to previous receipt of the rent, for the plaintiff had by law the right to two judicial opinions as to whether he was or was not in receipt of rent from the defendant up to the commencement of his suit (*a*). When the plaintiff sued for rent upon the allegation that he held a farming lease from one Doya Mani, and the defendant pleaded that he paid his rent to Shamasundari and another, and Shamasundari intervened, alleging that Doya Mani's rights had passed to her, and the Deputy Collector held that there was no title in Shamasundari, as she was a consenting party to the plaintiff's lease, the High Court ruled, on special appeal, that the appeal lay to the Judge, and the Judge thereupon decided against the plaintiff on the ground of title as well as of actual receipt of rent. Thereupon the High Court ruled that no question of title *necessarily* arose in this case, and the Judge therefore should have confined himself to the question of previous receipt of the rent. An unnecessary decision by a Deputy Collector on a point of title, does not authorise the Judge to decide the case on the ground of title (*b*). When a Deputy Collector in a distraint case adjudged certain lands

(*a*) *Syud Zeshar Hossain*, H. C., 7th April, 1866. But see Section 353, Code of Civil Procedure. It appears from the report that the plaintiff admitted he received the rent through the ijaradar, so it is not easy to see how there could be two opinions as to the matter.

(*b*) *Bhyrub Chunder Chand*, H. C., 4th November, 1867. See judgment of Mr. J. Phear in this case. This ruling is flatly contradictory of some before quoted, but it certainly seems a reasonable one.

to be plaintiff's *jeer* the appeal lay to the Judge (*a*). And similarly when in a suit for rent defendants were decided to be holding as proprietors (*b*). In a suit for arrears of rent under Rs. 100, and for ejectment under Section 78, the appeal lies to the Judge (*c*). When the plaintiff claimed to receive rent in virtue of a right under a will, and the defendant pleaded he was a mere agent who had been discharged, the appeal lay to the Judge (*d*). When a Deputy Collector ordered a petition of plaint to be "put up with the record" as informal, it was held that this amounted to a judgment and that an appeal lay (*e*). When a Deputy Collector in a suit under Section 78, after the arrear was paid finding that it had been caused by the *laches* of one of the sharers in the tenure, directed him to be removed from his share, it was held the Judge should not have refused to hear the appeal because it had been passed without jurisdiction (*f*). An appeal will lie from a case dismissed by default after issues have been fixed (*g*). A party cannot appeal against a decree favorable to himself (*h*). But though the decree may be in favor of a party, the decision may be partly against him, and he may then appeal (*i*). An appeal lies simply on a question of costs (*j*).

Procedure on appeal to Collector.—By Section 156, Act X, "The petition of appeal shall be written on stamp paper of eight annas value and shall be presented to the Collector within 15

(*a*) *Bygnath Singh*, N. W. P., 28th September, 1861.

(*b*) *Ghulam Sharif*, N W. P., 4th July, 1864.

(*c*) *Kalu Chand Chuckerbutty*, S. D., 26th June, 1862; *Kalibur Upadhya*, H C., 22nd June, 1864.

(*d*) *Gopal Chunder Rai*, H. C., 1st June, 1864.

(*e*) *Sheikh Ghulam Aheya*, H. C., 25th May, 1865.

(*f*) *Hari Bandhu Masti*, H. C, 5th December, 1865.

(*g*) *Lekraj Rai*, H C, 18th April, 1866.

(*h*) *Ram Prasad Rai*, H C., 16th July, 1866.

(*i*) *Inderjit Kunwer*, H C, 19th February, 1863, F. B.

(*j*) *Gurudhari Lall Rai*, F. B, VI, W. R., 187.

days from the date of the decree, provided that such time as may be requisite for procuring a copy of the decree appealed against shall not be reckoned as part of the 15 days." As to the stamp, the Board have ruled that petitions of appeal to the Collector must be on a stamp of the full value prescribed in Article 11 of Schedule B,, Act XXVI., 1867, though this Act does not expressly repeal Section 156, Act X. (*a*). When an appeal had been wrongly made to the Judge, the High Court refused to allow additional time for appealing to the Collector (*b*). But time appears to have been allowed in other cases (*c*). The Judge under Section 333, Code of Civil Procedure, has a discretion to admit an appeal after time (*d*). But the Collector has no such discretion even if the case be transferred to him by the Judge (*e*). In counting the fifteen days, the day of the decision appealed against is not to be reckoned (*f*). By Section 157 "The Collector shall fix a day for hearing the appeal, and shall cause notice of the same to be served on the respondent in the manner hereinbefore prescribed for the service of summons. If on the day fixed for hearing, the appeal or any other day to which the hearing may be adjourned, the appellant shall not appear in person or by an agent, the appeal shall be dismissed for default. If the appellant shall appear and the respondent shall not appear in person or by an agent, the appeal shall be heard *ex parte*." By Section 158, "If an appeal be dismissed for default of prosecution, the appellant may, within fifteen days from the date of the dismissal, apply to the Collector for the re-admission of the appeal, and if it shall be proved to the

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(*a*) Board's Rules, Chapter XVI., Section 1, Clause, 6, (published in September, 1867.)

(*b*) *Rajballab Bhuny*, H. C., 10th August, 1863.

(*c*) *Gokul Dass*, N. W. P., 12th May, 1865.

(*d*) *Mudusudun Mujumdar*, H. C., 14th March, 1866; *Mothura Nath Rai*, H. C., 11th July, 1866; *Raj Kumar Rai*, H. C., 5th April, 1867.

(*e*) *Kali Kishwar Pal*, H. C., 20th March, 1866.

(*f*) *Radha Mani Chaudhrain*, H. C., 20th November, 1865.

satisfaction of the Collector that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the Collector may re-admit the appeal." By Section 159, "After hearing the appeal the Collector shall give judgment in the manner hereinbefore prescribed for giving judgment in original suits, and the judgment of the Collector shall be final." When the interest of all the defendants are identical, the whole case may be decreed on the appeal of one defendant (*a*). The pleas and objections raised must be disposed of (*b*). An appeal cannot be tried upon an issue not tried in the Lower Court; the proper course is to remand the case (*c*). An Appellate Court must give reasons (*d*). It was ruled in the case of *Kali Kishwar Pal* (H. C., 20th March, 1866) that Section 333, Code of Civil Procedure, does not apply to appeals to a Collector, and it may be inferred from this that the other Sections of the Civil Procedure Code relating to procedure in appeal are likewise inapplicable, so that a Collector has apparently no legal power to remand a case.

Appeal to Judge.—By Section 160, Act X, "In all suits other than those in which, when tried and decided by a Collector, the judgment of the Collector is declared to be final, or when tried and decided by a Deputy Collector an appeal is allowed to the Collector, an appeal from the judgment of the Collector or Deputy Collector shall lie to the Zillah Judge, unless the amount or value in dispute exceeds five thousand rupees, in which case, the appeal shall lie to the High Court." By Section 161, "The petition of appeal shall be written on the stamp paper prescribed for appeals from the subordinate Civil Courts, with reference to the amount or value of the property involved in the appeal, and the rules in force in regard to

(*a*) *Ram Chunder Chaudhari*, 25th September, 1863.

(*b*) *Bhowani Dutt*, H. C., 5th September, 1864.

(*c*) *Ishwar Chunder Ghosal*, H. C., 20th August, 1864.

(*d*) *Muhammad Zaki Kazi*, H. C., 23rd February, 1865.

the time within which appeals from the decisions of such Court may be received, and to the manner in which such appeals are heard and determined, and to all proceedings which may be had in respect of such appeals, shall be applicable to appeals to the Zillah Judge or Sudder Court under this Act." The rules for Civil Court appeals are contained in Sections 332-362, Code of Civil Procedure, Section 333 prescribes that the appeal is to be preferred by a memorandum to be presented within thirty days, if the appeal is to a District Court, and within ninety days, if to the Sudder Court. By Section 334, the memorandum is to set forth concisely the grounds of appeal, and the appellant shall not be heard upon any other ground without leave of the Court, but the Court in deciding the appeal shall not be confined to these grounds. It has been ruled that limitation cannot be pleaded for the first time in appeal (*a*). By Section 336, if the memorandum be not in the form prescribed in Section 334, or be not duly presented, it may be returned. By Section 337, one of several plaintiffs or defendants may appeal and obtain a reversal of the whole decree, if it proceed on a ground common to all. But it is otherwise if the decree proceed on a ground not common to all (*b*). When two defendants were sued on a joint liability to pay rent, and one only appealed, it was held that the whole decree might be reversed on the ground that the appellant held a separate tenure at a separate rent (*c*). By Section 341, the date of presentation is to be endorsed on the memorandum, and it is to be registered. By Section 342, the Court may require security for costs from the appellant. By Section 343, notice is to be sent to the Lower Court which will transmit the papers (*d*). By Section 344,

(*a*) *Advaitya Churn Rai*, H. C., 13th July, 1863; *Collector of Rajshahye*, 26th July, 1864. But see *Muhammad Dad Khan*, 11th July, 1864.

(*b*) *Abdul Ali*, II, W. R., 287.

(*c*) *Luckee Kant Sen*, H. C., 13th February, 1863.

(*d*) As to the mode of disposing of an appeal, when the record is lost; See *Guru Dyal Singh*, H. C., 5th January, 1867.

a day for hearing the appeal is to be fixed. By Section 345, notice is to be affixed in the Court, and served through the Lower Court on the respondent. By Section 346, if the appellant fail to appear in person or by pleader, the appeal shall be dismissed for default. If the respondent shall not appear, it shall be heard *ex parte*. Section 347 provides for the re-admission of appeals dismissed for default. By Section 348, the respondent may object to the decision of the Lower Court in the same manner as if he had preferred a separate appeal (*a*). By note (e) Art 11, Act XXVI, 1867, such objection shall not be heard until the respondent shall have paid the amount of stamp duty by which the stamp duty paid by the appellant falls short of the total duty payable in respect of the whole value of the suit. By Section 350, no judgment shall be reversed or modified, nor shall any case be remanded to the Lower Court on account of any error, defect or irregularity either in the decision or any interlocutory order passed in the suit, not affecting the merits of the case, or the jurisdiction of the Court. The High Court will adopt the rule laid down by the Privy Council, that it will not disturb a judgment upon a question as to the credibility of a witness, unless it be manifestly clear from the probabilities attached to certain circumstances of the case, that the Court was wrong in the conclusion drawn from such evidence (*b*). An Appellate Court should not reverse a decree on account of under valuation of the claim (*c*). When both parties have acquiesced in the jurisdiction, the decree should not be reversed on this ground (*d*). By Sections 351-2 the case can be remanded only, "if the Lower Court shall have disposed of the case upon any preliminary point, so as to exclude any evidence

(*a*) See *Ishwar Ghose*, H. C., 24th September, 1862.

(*b*) *Hira Lall Chuckerbutty*, I, Hyde, 105; VIII, Moore, P. C., 90.

(*c*) *Nabsabin Bebu*, Bombay, H. C., Reports 1863; as to limitation, see *Krishun Chunder Chattarjya*, H. C., 16th December, 1865.

(*d*) *Jiban Lall Dass*, I, W. R., 179.

of fact which shall appear to the Appellate Court essential to the rights of the parties, and the decree of the Lower Court, upon such preliminary point shall be reversed." By note (d) Article II, Act XXVI, 1867, if a plaint, rejected by the Lower Court, shall be ordered to be received, or if a suit shall be remanded on any of the ground mentioned in Section 351, Code of Civil Procedure, the Appellate Court shall grant a certificate authorising the appellant to receive back the amount of stamp duty. By Section 353, where the evidence upon the record is sufficient, the Appellate Court must determine the case though the Lower Court has decided on other grounds. By Section 354, if the Lower Court shall have omitted to raise or try any issue, or to determine any question of fact which shall appear to the Appellate Court essential to the right determination of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question of fact, the Appellate Court may frame an issue for trial by the Lower Court. By Section 355, it shall not be competent to the appellant to produce additional evidence, but if it appear that the Lower Court rejected competent evidence, or if the Appellate Court requires additional evidence, the Appellate Court may receive such evidence, recording its reasons. By Section 356, the Appellate Court may take such evidence itself, or require the Lower Appellate Court to take it. When a suit is remanded for the production of particular evidence, the parties cannot be allowed to put in other fresh evidence (*a*). By Section 357, in such cases the Appellate Court shall define the points on which additional evidence is to be taken. By Section 37, Act XXIII., 1861, the Appellate Court shall have the same powers as a Court of original jurisdiction. Sections 359, 360, Code of Civil Procedure, direct what the judgment and decree are to contain. They are to specify clearly the relief

(*a*) *Bolaki Lall*, H. C., 22nd December, 1864. But see *Kuny Behari Wustı*, 2nd August, 1867

granted or other determination of the case. The words "decree for the plaintiff" are insufficient (*a*). By Section 361, a certified copy of the decree is to be transmitted to the Lower Court. By Section 362, the decree is to be executed by the Lower Court (*b*). Sections 367-371 provide for appeals *in forma pauperis*.

VIII.—Of Special Appeal.

By Section 372, C. C. P., "Unless, otherwise provided by any law for the time being in force, a special appeal shall lie to the Sudder Court from all decisions passed in regular appeal by the Courts subordinate to the Sudder Court on the ground of the decision being contrary to some law, or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits, and on no other ground." Section 57, Act II., 1855, provides that the improper admission or rejection of evidence shall not be ground for a reversal of a decision, if such error of admission or rejection does not affect the decision. Judgments passed in appeal by Judges under Act X., are appealable under this Section (*c*), but not those passed by Collector (*d*). Refusal to allow further time to produce additional evidence (*e*), admission of an unstamped receipt (*f*), objections to the sufficiency and credibility of the evidence (*g*), objections by parties who did not appeal from the decision of the first Court (*h*), form no grounds for special appeal. On the other

(*a*) See *Chunder Mani Dasya*, H. C., 3rd January, 1867.
(*b*) As to costs, see *Hem Chunder*, H. C., 4th March, 1863.
(*c*) *Hullodhar Biswas*, S. D., 30th March, 1861.
(*d*) *Hara Mohn Mukherjya*, H. C., 9th February, 1866.
(*e*) *Kistojiban Bukshe*, H. C., 5th August, 1863.
(*f*) *Kaimulla*, H. C., 5th August, 1863.
(*g*) *Brijo Behari Lall*, H. C., 5th January, 1864.
(*h*) *Bykunt Ram Saha*, H. C., 1st July, 1864.

hand the misconstruction of a document forming the basis of the claim (*a*), a misapprehension by the Judge of the finding of the Lower Court causing an error in the procedure by which a party to the suit is prejudiced (*b*), the fact of the judgment being based on no evidence at all or on what is not legal evidence (*c*), are all valid grounds of Special appeal. A party cannot set up an altogether fresh case in Special appeals (*d*).

As to the High Court power of general superintendence, when a Collector irregularly imprisoned the heir of a party against whom a summary decree had been obtained under Regulation VII., 1799, the heir having inherited only immoveable property from the judgment-debtor, (such property under Section 18, Regulation VIII, 1819, being saleable only after a regular decree), one Judge was of opinion that the High Court could interfere under Section 15 of the charter, while two others thought not (*e*). In a subsequent case in which a decree had been executed which was afterwards reversed on appeal, and the Deputy Collector refused to enforce restitution of the amount levied, a Full Bench decided that the High Court could interfere under its general powers of superintendence conferred by Section 15 of the charter (*f*). When an appeal in a case involving a question of title was heard by the Collector, the High Court set his decision aside under Section 15 of the charter (*g*). By Section 35, Act XXIII, 1861, the

(*a*) *Prankishn Singh Surma*, S. D., 1st October, 1861; *Lalla Mull* N. W. P., 1861, 4, see *Gani Biswas*, H. C., 2nd September, 1867.

(*b*) *Dino Nath Mukherjya*, H. C., 3rd July, 1863.

(*c*) *Ram Sundar Sirkar*, H. C., 3rd March, 1863; *Mohun Chunder Dhut*, 25th March, 1863. See *Mohabir Singh*, 27th November, 1867.

(*d*) *Sheo Das Narain*, H. C., 5th January, 1869.

(*e*) *Gopal Singh*, H. C., 2nd May, 1867; see *Huru Mohan Mukherjya* H. C., 9th February, 1866.

(*f*) *Gobind Kumar Chaudhari*, H. C., 31st May, 1867, F. B.

(*g*) *Bhyrub Chunder Chunder*, H. C., 8th September, 1866; see *Krishna Tadei Rai Chaudhari*, VI, W. R., 56, and *DaCosta*, V, W. R., Miscellaneous 68.

Sudder Court may call for the record of any case decided in appeal by any Lower Appellate Court in which no further appeal shall lie to the Sudder Court, if such subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law, and set aside the decision, or pass the proper orders. When a Judge and a Collector heard appeals from orders in execution of decree, the High Court set their decisions aside, but it was not settled whether this Section applied (*a*). When a Collector wrongly sold immoveable property in execution, the High Court set the sale aside (*b*).

IX.—Of Review of Judgment.

By Section 154, Act X., "In suits in which the judgment of the Collector is final, as provided in the last preceding Section, the Collector may, upon the application of either party if preferred within thirty days from the date of the decision order the re-hearing of a suit upon the ground of the discovery of new evidence, or matter material to the issue of the case which the applicant had no knowledge of or could not produce at the time of trial." Section 376, Code of Civil Procedure, allows reviews of judgment, original or in appeal, which have not been appealed against, on the ground of discovery of new evidence, or for "other good and sufficient reason," if application be made within ninety days. It has been held that this Section applies to orders made by Civil Court in execution of decree (*c*), but it does not apply to Revenue Courts (*d*); and hence Deputy Collectors may not review their orders passed

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(*a*) *R. C. Bell Campbell*, H. C., 25th June, 1866; *Dokouri Kazi*, H. C., 26th August, 1866, F. B.

(*b*) *Desarut Ulla*, H. C., 5th September, 1868.

(*c*) *Harzdhun Mukharjya*, Marshall, 205.

(*d*) *Sukhanand Mayi Debya*, I, W. R., 73.

in execution of decree (*a*). But if a Deputy Collector does review his order, no appeal lies to the Collector (*b*). A Judge may review his order for the admission of an appeal after time. But if he does so, an appeal lies to the High Court (*c*). A Judge is competent to review his judgment in an Act X case (*d*). But he cannot allow the plaintiff to shift his ground, and set up an entirely new case (*e*). It is doubtful whether a Collector has power to review a judgment passed by him on appeal. See case of Dokoury Kari, 26th August, 1866.

The fact that a special appeal has been preferred in the High Court prevents any party to the suit from obtaining a review of judgment in the Lower Court (*f*).

(*a*) *Pertab Chunder Singh*, H. C., 15th May, 1865. This being so, it does not appear how the interference of the superior revenue authorities (as directed in Clause 3, Section 8, Chapter XVI, Board's Rules,) can correct irregularities in orders relating to execution of decrees.

(*b*) *Adurmani Dasya*, H. C., 21st July, 1865.

(*c*) *Mothura Nath Rai*, H. C., 11th July, 1866.

(*d*) *Sheikh Najib*, S. D., 11th June, 1862.

(*e*) *Nara Hari Muhunt*, H. C., 12th August, 1862.

(*f*) *L. T. Lucas*, H. C., 24th February, 1868.

APPENDIX.

ADDENDA.

Page 3.—In support of the distinction made in the text between statutory and contract tenancies, reference may be made to the following extract from Mr. Maine's speech on the Punjab Tenancy Act:—

"The exact economical position of the ryot whose tenure is one of occupancy, I take to be this. He cannot be evicted except on certain conditions, and the profits of the cultivation of the soil (independently of the share of those profits taken by the Government as revenue, and independently of the portion which represents the cost of tillage, and of the cultivator's subsistence, and the interest of whatever capital he may have embarked), are divided under varying rules of law between the occupancy-tenant and the landlord, instead of going wholly to the landlord, as in the case of a tenant-at-will. This being so, I have always held the opinion attributed to me at a recent sitting of this Council by my hon'ble friend Mr. Strachey, that in strictness of language, the occupancy-tenant is a co-proprietor with the landlord. Rights over land or any valuable commodity are either rights arising out of contract or proprietary rights. This distribution of rights is considered by the best jurists as exhaustive; if, then, the occupancy-ryot does not hold (and it is clear he does not hold) under contract, it follows that he has some sort of right of property in the land."

Page 7.—The existence of a lease, clearly not intended to be a perpetual lease, will not exclude the *taluk* from the benefit of this section.—*Dhanpat Singh*, P. C., 20th December, 1867.

Page 21.—As to the effect of consolidation of several holdings, see *Kazi Khuda Newaz*, H. C., 3rd April, 1866, and *Raj Kishwar Mukharjya*, 8th July, 1868.

A reduction of the rent due to abatement of rent for diluvion, or to a transfer with the landlord's consent of part of a holding, is not a change in the rate.—*Reaz-un-nissa*, 13th August, 1868; *Kissen Ram Mullick*, H. C., 16th January, 1865.

Page 26.—A right of occupancy is not vitiated by sub-letting.—*Haran Chunder Pal.*, H. C., 6th July, 1868, nor by consolidation of several holdings in the hands of one man.—*Judub Chunder Holdar*, 11th August, 1865.

A ryot holding originally upon a service tenure may, when that ceases, acquire a right of occupancy.—*Kali Churn Singh*, H. C., 16th May, 1868.

A right of occupancy cannot arise out of a holding which began and has continued by fraud.—*Bhawan Joy Acharjya*, H. C., 6th April, 1868, but such right is not vitiated by every defect in the origin of the title.—*Shib Nath Ray*, H. C., 20th August, 1867.

A right of occupancy may be acquired by holding upon payment in kind.—*Harihar Mukharjya*, H. C., 5th July, 1866, but not by holding a fishery.—*Uma Kant Sirkar*, H. C., 14th January, 1868.

Page 45, note (*a*).—See *Radhica Prosad Chunder*, H. C., 10th June, 1868.

Page 50.—See *Jogeshwur Sirkar*, H. C., 3rd July, 1868.

Page 52, note (*b*).—See Board's Circular No. 7 of July, 1867.

Page 54.— *Primâ facie*, a *Gomashta* is not entitled to grant leases.—*Kali Kumar Dass*, 9th May, 1865; *Annoda Pershad Banarjya*, 15th April, 1867; *Goluk Mani Debya*, 31st August, 1864.

Page 62.—An *Abda-Rasadi jumma* is one under which no rent is paid for the first few years, (during which the lands are supposed to be brought into cultivation,) and afterwards the rent gradually rises. See *Gholam Ali*, H. C., 3rd January, 1868.

The Privy Council have ruled that evidence of long and uninterrupted enjoyment, and of the descent of a tenure from father to son, may prove the tenure to be hereditary, and *istimrari*, though there may be no words of inheritance in the lease.—*Satyocharan Ghosal*, P. C., 18th January, 1869.

Page 64.—A *Kabuliyat* which mentions no term, is for one year only.—*Madhu Ram Dey*, H. C., 20th May, 1868.

Delivery of possession.—Whenever a landlord grants a lease, there is an implied contract on his part to give possession of the land, and it has

been said, that liability to pay the rent depends on the tenant being put in possession. See *Addison on Contracts*, 344. Thus, even when a defendant had given a *kabuliyat*, but had not succeeded in getting possession, the suit for rent was dismissed.—*Harish Chunder Kunda*, 18th May, 1868; *Douzella*, 26th April, 1865. But probably this plea would not be accepted, if the tenant's failure to get possession were owing to his own negligence. See page 135.

Page 66.—A lease for no definite term, but fixing an annual rent, must be registered.—*Ram Kumar Mundal*, H. C., 26th November, 1868.

Kabuliyats executed by Government lessees require stamp.—R. B. Circular, 9th April, 1869.

Page 67, note (*a*).—*Sheikh Rahmatulla*, 7th August, 1868, F. B.

Page 77, line 15, for *holdings*, read *holidays*, and in line 19, for *for*, read *on*.

Page 82, line 20, for *rest* read *rests*.

Page 83.—Payments made without specification may be credited to any year the landlord pleases.—*Rani Surnamaye*, H. C., 29th May, 1867.

Page 84.—No special appeal on the question of damages will lie.—*Gopal Lall Thakur*, H. C., 21st May, 1864.

Page 85.—Payment to one of several joint proprietors discharges the tenant.—*Adit Narain Singh*, H. C., 12th January, 1865.

Page 87, note (*c*).—For *jamigdar* and *zamozdar* read *jamogdar* and *zamindar*.

Page 89.—The doctrine of the landlord's lien, or rather a necessary consequence of that doctrine has been repudiated in the Full Bench case of *Shahabudin*, H. C., 13th March, 1867, which rules that an under-tenure sold for its own arrears under Act X., will only pass free of encumbrance, when the right to sell it was especially reserved in the lease. See page 236.

Page 92.—The appointment of a *sezawal*, as a general rule, absolves the tenant from liability for rent thenceforward, and from liability for any short collections by the *sezawal*.—*Jhumak Chowdry*, H. C., 18th February and 5th March, 1866.

Page 95.—Shareholders cannot sue separately upon a *kabuliyat*, given to them all jointly without specification of shares.—*Kali Churn Singh*, H. C., 18th July, 1867, nor can one of two heirs sue separately on such a *Kabuliyat*. If the co-heir declines to join in a suit, he must be made a

defendant, and the suit may, perhaps, then lie in the Civil Court only.—*Jagadamba Dasya*, II. C., 3rd July, 1868.

Page 97, note (*j*).—Add *Bhubon Mohan*, H. C., 22nd November, 1867.

Page 97.—If the beneficiary interest of a real lessee be established, he is liable, unless, by special contract, the *farzi* alone be liable.—*Jadu Nuth Pal*, II. C. 3rd Januray, 1868. It appears that the *Benamidar* can be sued, if the allegation be that the *farzi* is his agent, but not so, if it be alleged that he is liable only in equity.—*Prosono Kumar Pal Chowdhry*, II. C., 23rd September, 1867, F. B. When an engagement has been entered into by several persons jointly, one of them cannot be sued alone.—*Rup Naraian Singh*, H. C., 24th August, 1868.

Note (*j*).—Sureties cannot be sued under Act X.—*Rai Priyanath Chowdhry*, II, C., 15th February, 1869.

Page 98.—Cesses cannot be sued for under Act X.—*Horish Chunder Kundu*, H. C., 10th August, 1865; *Arjun Saha*, 16th August, 1868; nor revenue due from resumed land spending settlement.—*Government*, H. C., 8th May, 1865; nor rent fixed as part of a contract for working mines.—*Sirmanjury Dasya*, H. C., 27th April, 1868; nor a contribution due by a *putneedar* towards the cost of the *Zamindary Dâk*.—*Ratan Moni*, H. C., 31st July, 1866.

When a farmer agreed to pay his landlord the half of any enhanced rent which he might succeed in realising from the *ryots*, it was held that the amount might be sued for under Act X.—*Bhobotarini Dasya*, H. C., 5th January, 1869.

Page 100, note (*d*).—Add—But the cultivation of his own share by one sharer, does not make him a tenant of the others.—*Radha Kunwer*, H. C., 29th July, 1864.

Page 101, note (*b*).—Add—*Grish Chunder Rai Chowdry*, H. C., 9th September, 1868.

Page 101, note (*e*).—Add—The selling value to be taken is that which prevailed when the crops were cut.—*Lachman Prasad*, H. C., 12th February, 1869.

Page 103, note (*b*).—Add—*Durga Das Chatarjya*, H. C., 3rd September, 1866.

When a putnee was sold for arrears, and the sale was afterwards reversed for irregularity, the Privy Council ruled that limitation ran

only from the date of the reversal of the sale.—*Rani Surnamaye*, P. C, 17th December, 1868.

Page 110.—Suit may be brought for the rent of *utbandi* land secretly cultivated.—*Mirzan Biswas*, H. C., 11th August, 1865.

Page 111.—The plea of non-jurisdiction must be listened to, whenever raised.—*Nobin Kishen Mukharjya*, H. C., 27th May, 1867. But if the plea has not been raised, the High Court will not interfere after the decision of the case.—*Debi Mayi Debya*, H. C., 2nd June, 1868.

Separate suits by different parties, albeit for the same cause of action, cannot be joined as one.—*Ram Kanhai Sirkar*, H. C., 20th August, 1868.

Page 117.—A purchaser of a tenure who has been admitted by the Court, cannot refuse rent on the plea that he has not been able to collect from the *ryots*.—*Inder Bhusan Rai*, H. C., 10th April, 1866. See page 266.

Page 119, note (*d*).—Add—*Kishen Das*, H. C., 27th August, 1868.

Page 127.—In a suit under Section 142, damages cannot be awarded as for illegal distraint, under Section 138.—*Nancuram*, H. C., 24th April, 1866.

A suit by A against B for distraining A's property in collusion with C lies under Section 139.—*Taylall Shakh*, H. C., 26th January, 1868.

A landlord who had got a decree for possession and executed it, was cast in damages for distraining the crops grown thereafter by the original *ryots*, on the pretence that they were the crops of a new *ryot*.—*Adar Mohan Chuckerbutty*, H. C., 23rd June, 1868.

Page 130.—None but *recorded* proprietors can apply.—R. B., 6th May, 1868.

Page 133.—The Board have ruled that Collectors should receive payment of arrears due from *putneedars* only, when a *putneedar* contests the demand under Clause 2, Section 14, or a *dur-putneedar* deposits the amount under Clause 2, Section 13, to save his under-tenure.— R. B., 6th May, 1868.

Page 135.—Section 25, Regulation VII, 1799, has now been repealed by Act VII, 1868, B. C.

Page 138.—See page 92 for effect of appointment of *sezawal*, also page 184.

Page 141.—In the case of *Jayat Chunder Dutt, vs. D. Panioty*, H. C., 20th August, 1866; 23rd September, 1867; 24th March, 1868; it was

held that Section 15, Act X, bars assessment of accretions to *taluks* held at a fixed rent from 1793 ; and in other cases, the custom of assessing accretions must be proved.

Page 143.—The rent of a middleman, with a right of occupancy can be enhanced only according to the pergunnah rate payable by the holders of similar tenures.—*Dhanpat Singh*, P. C., 20th December, 1867 ; *Mani Karnika Chowdhri*, H. C., 13th August, 1868.

A tenant under an *Abadkari* lease, who has come to pay his maximum rent, cannot be treated exactly like an ordinary *ryot* under Section 17, Act X.—*Poramanund Sen*, H. C., 10th March, 1868. The better opinion seems to be that the maximum rent may be enhanced.—*Kasimudin Khondkar*, 24th February, 1869 ; *Bharat Chunder Aitch*, 11th January, 1869 ; *Padma Mani Dasya*, H. C., 15th February, 1867. The *onus* of proving the "prevailing rate" is on the plaintiff.—*Jan Ali*, 22nd January, 1868.

By "class" in this clause is meant "having rights of occupancy."—*Sadhu Singh*, 4th January, 1868.

Page 153.—The increased value of the produce is no ground for enhancement when the rent is paid in kind.—*Pilaram Kotal*, H. C., 15th August, 1866. An increase of value for building or such purpose, is not what is meant by increase of productive powers in this clause.—*Bireshwar Chuckerbutty*, H. C., 15th January, 1868.

Page 155.—When A, the holder of an independent *taluk*, the lands of which lay within the boundaries of B's *zamindari*, let it to C who, under cover of his lease, encroached upon the *zamimdari* lands, it was held there was no implied contract of tenancy between C and B, and B could not sue C for rent on account of the excess lands—*Joynaraian Singh*, H. C., 18th June, 1868, where the former cases are referred to. A *ryot* with a right of fixed rent is liable under this clause, unless his boundaries are fixed.—*Reaz-un-Nissa*, H. C., 9th, August, 1867.

Page 156.—A *ryot* without a right of occupancy, cannot be made to pay more than a reasonable amount of rent.—*Bakranath Mondul*, 6th August, 1868, F. B.

Page 157.—When leases had been granted of land for the purpose of building a church and school, and a factory, it was held that suit for enhancement would not lie under Act X.—*Rani Surnamoye*, H. C., 11th May, 1868 ; *Kerry*, 17th July, 1868 ; *Kali Mohan Chatarjya*,

1st March, 1869. A building lease, granted by a per son with a life interest only, will not protect the lessee from enhancement by the lessor's successor.—*Jogeshwari Boishnavi*, 20th November, 1866.

Page 159.—This Section does not apply to dependent *talukdars* whose rent can be enhanced only upon the grounds stated in Section 51, Regulation VIII., 1793.—*Hara Nath Rai*, H. C., 10th June, 1865; *Nobo Kishwar Bose*, H. C., 8th April, 1867; *Breja Sunder Mitter*, 5th December, 1867; *Har Sundari Choudhraini*, 8th May, 1867. But it applies to *ryots* without right of occupancy.—*Bakra Nath Mondul*, H C., 6th August, 1868. The ground must be one of the grounds stated in Section 17. It is not enough for instance to say that the rent paid is less than surrounding rates.—*Baidya Nath*, H. C., 19th February, 1868. If the notice specify excess area, without adding that it has been proved by measurement, it is invalid.—*Kali Kumari Dasya*, H. C., 19th July, 1866. So if it specify the second ground without the words "otherwise than by the agency or at the expense of the *ryot*."—*Shujaiat Ali*, 11th August, 1866. It has been ruled that a mere statement that the land will bear a higher rate is a sufficient ground if the *ryot* have no right of occupancy (*Raghu Buns Tewary*, 20th December, 1865), but apparently this has been overruled by the Full Bench decision in the case of *Bakra Nath Mondul*, above cited. A notice alleging generally all the grounds mentioned in Section 17 is probably not sufficiently definite.—*Dwarkanath Choudhry*, H. C., 27th August, 1868. See page 166.

Page 163, note (*a*).—Similarly no notice is necessary to enable a landlord to demand rent for newly formed land.—*R. Watson*, H. C., 29th August, 1868.

A notice by his landlord will not enable a farmer whose lease is subsequently granted to sue.—*Durga Rai*, H. C., 20th June, 1867.

Page 164.— If a *ryot* bring an action under Section 14, and fail, the special limitation no longer applies.—*Padma Lochan Bhadori*, H. C., 5th April, 1866.

Page 165.—When lands held under one *jumma* lie in two jurisdictions, the plaintiff must sue in the jurisdiction in which the greater part of the land lies, to enhance the undivided *jumma*.—*Mohesh Chunder Sircar*, H. C., 7th December, 1867. The Lower Court acted wrongly in dismissing the suit on the ground that the defendant occupied the lands under different titles, and in various titles, when such objection was not raised by the defendant, and was no bar to the suit.—*Durga*

Churn Sircar, H. C., 20th December, 1867. But see *Bijoy Gobind Bural*, 24th July, 1867.

Page 166, note (*g*).—Add—*Durga Churn Sirkar*, 20th December, 1867.

If the notice specify one of the grounds of Section 17, the landlord cannot, upon failing to prove that ground, fall back upon asserting a tenancy-at-will.—*Khola Mundal*, H. C., 6th July, 1866. Though the plaintiff fail to prove his right to enhanced rent, he is entitled to a decree at old rates.—*Chunder Narain Choudhry*, H. C., 12th January, 1865.

Page 166, note (*d*).—The case of *Harihur Mukharjya* vs *Quomani Kazi*, was decided by a bench of three Judges.

Page 167, note (*h*).—In a recent case, the High Court said that it is proper in these cases to depute an *amin* to enquire as to the description of the land and surrounding rates.—*Gaur Chunder Rai*, H. C., 20th June, 1868.

Page 169.—A proprietor of a fractional share of an undivided estate, though receiving a definite portion of the rent from the *ryot*, is not entitled to maintain against him a suit for a separate *kabuliyut*.—*Surat Sundari Debya*, H. C., 8th January, 1864, (P) *E. C., Nidhi Ram Sircar*, 24th August, 1866. When a plaintiff sues for a *kabuliyat*, he must prove that the defendant is liable to pay the particular rent claimed, and also that he holds the particular land stated in the plaint.—*Gholam Muhammad*, H. C., 19th March, 1868, F. B.; *Shib Chunder Bose*, 5th May, 1868; *Gour Chunder Rai*, 10th June, 1868; *Din Dayal Poramanik*, 25th June, 1868. In a recent case, the Court raised this objection themselves, though it was not pleaded.—*Hamid Ali*, 29th July, 1868.

If the plaint specifies no date for the commencement of the *kabuliyat*, it ought to be returned, or the Court may supply the omission.—*Gholam Mahomed*, F. B., 19th March, 1868.

When a *putneedar* held a single putnee-lease of several *zamindaris*, it was held that one of the *zamindars* could not sue him for a separate *kabuliyat* under Act X.—*Poresh Nath Rai*, 24th February, 1864. A planter who cultivates indigo over a whole plain, so obliterating boundary marks, is not to escape liability for rent to the several owners.—*Brojonath Rai*, H. C., 8th February, 1865. A *putneedar* cannot demand a *kabuliyat* from a dependent *talukdar*.—*Monsur Ahmad*, H. C. 27th July, 1864. A *kabuliyut* for part of a tenure cannot be decreed.—*Ram*

Dass Bhuttacharjya, 26th December, 1866.—*Abdul Ali*, H. C., 27th November, 1867. See *Dukhi Ram Sircar*, 25th August, 1868. A servant of a mosque paid by land cannot be sued for a *kabuliyat* by the *Mutawali*.—*Hadaiat Ali*, H. C., 26th June, 1866.

Page 171, note (*g*).—When a *zamindar* sued a *ryot* for determination of enhanced rent and *kabuliyat*, on account of excess land, not covered by any *pottah*, but within the limits of the defendant's *jote*, it was held that the Court should ascertain the fair and equitable rate, but could not grant a *kabuliyat*.—*Muktakeshi Debya Chowdhry*, H. C., 15th December, 1868.

Page 172, note (*f*).—*Syud Ahmad Reza*, 3rd December, 1868.

The *kabuliyat* must express the terms of the tenancy previous to the suit, unless something has happened to alter the former relation.—*Amed Ali*, H. C., 2nd July, 1868.

No suit for *kabuliyat* lies against a *ryot* without a right of occupancy.—*Khuda Baksh*, H. C., 23rd May, 1868? (See Section 9, Act X.)

Page 173.—The tender of a *pottah* is not a necessary preliminary to a suit for a *kabuliyat*.—*Mahomed Yakub Hosain*, H. C., 16th November, 1865; *Mansar Ali*, 19th March, 1867; *Mudu Sudon Chowdhry*, 28th November, 1868.

A landlord need not always sue to resume lands alleged to be held rent free before suing for a *kabuliyat*, *Bibi Farlan*, H. C., 18th February, 1867; but he must prove his right to assess.—*Ram Nath Singh Bahadur*, 16th July, 1867.

Page 175.—The plaintiff in a suit for measurement must be in actual receipt of the rent.—*Kali Das Nundy*, H. C., 26th June, 1866; *Parijan Khatun*, 29th January, 1867; *T. P. Wise*, 26th April, 1867. A *putneedar* cannot measure independant *lakhiraj*.—*Prosono Mayi Debya*, H. C, 11th November, 1868, nor can he apply for special record under Section 10, of tenures in a *dur-putnee*.—*Dwarknath Chuckerbutty*, H. C., 5th June, 1867.

Page 176, note (*c*).—*Erskine and Co.*, H. C, 27th April, 1868. Neighbouring *zamindars* alleging encroachment cannot intervene;—*Porameshwari Prosad Narain Singh*, H. C., 25th April, 1865.

If enhancement be claimed on the ground of excess area, the rod must be the same as that referred to in the lease.—*Macintosh*, H. C., 27th June, 1865.

Page 177, note (*d*).—For *is measured*, read *measure is*, and for *40*, read 20. The exact dimensions of a "*Shahi*" *Kani* are 19 B, 16 C.

Pages 178-179.—For *Khaterjan* read *Khatiyan*.

Page 184.—See note to page 64, on "delivery of possession."

Page 186, note (*e*).—E. C. *Mahomed Taki*, H. C., 2nd June, 1868.

Page 189.—A mortgagee cannot sue under this section.—*Hardi Narain Saha*, H. C., 7th August, 1867, nor a lessee holding over, who is a mere trespasser.—*Uma Kishwari Dasya*, 8th June, 1866.

Page 192, note (*a*).—*Jonardan Acharjya*, H. C., 29th April, 1868, F. B.

Page 194.—A *ryot* asking for a *pottah* at fair and equitable rates in virtue of a right of occupancy cannot obtain a pottah at fixed rates.—*Lutf Ali*, H. C., 11th September, 1866. When the plaintiff sues for a *pottah* at fixed rates, and is proved to have only a right of occupancy, the Court may proceed to determine the fair and equitable rates, even though no notice of enhancement has been given.—*Sheo Dey Mahton*, H. C., 4th January, 1868.

Page 195, note (*b*).—A *putneedar* claiming abatement on the ground of fraud may sue.—*Shakur Ali*, H. C., 6th December, 1867. See *Nilmani Sing Deo*, H. C., 7th January, 1868.

Page 196.—The amount of rent to be abated on account of the loss of any particular lands, where the lease does not show the exact rent of the lands lost, is to be in proportion to the value of the lost land as compared with the value of the whole.—*Brij Nath Pal Chowdhary*, H. C., 8th July, 1868.

Page 197.—Abatement of the rent of a permanent tenure cannot be claimed on the ground that the area is less than that mentioned in the lease, even though the lease provide for the assessment of excess area.—*Ram Kant Chowdhary*, 16th February, 1865.

Page 199.—A landlord who leases land without any further stipulation as to title, undertakes that he has sufficient title to support the lease, and guarantees to the tenant quiet possession and enjoyment. If he fail, the tenant is entitled to abatement of rent—*Brij Nath Pal*, H. C., 6th July, 1868.

A suit for abatement and refund of *salami* is cognizable by the Civil Court only.—*Nilmani Singh Deo*, 8th August, 1868, F. B.

The plaintiff must admit the title of his landlord to all the lands in respect of which he claims abatement.—*Obhoy Govind Chowdhry*, H. C., 24th December, 1867.

Page 200.—There is such a thing as a suit under Section 14 apart from a suit under Clause 3, Section 23.—*Surup Chunder Pal*, H. C., 5th September, 1864.

Pag 201, note (*a*).—Add 12th March, 1863.

Page 203.—Line 27 for *XL.* read *IX.*

Page 213.—A man cannot bind his heirs not to surrender.—*Sri Gopal Pal Chowdhary*, 6th January, 1868. Surrender by the registered *jotedar* will not oust his sharers, if he was registered as their representative only.—*Bykant Nath Dass*, 12th February, 1868. The surrender of one of several joint lessees does not necessarily void the lease as regards the rest. —*Mohim Chunder Sen*, 22nd January, 1868.

To make a surrender by a guardian binding on the minor, it must be shown that it was for the minor's benefit.—*Kedar Nath Mukhurjya*, 15th June, 1868.

Page 218.—One of several joint lessors can eject a lessee after expiry of the lease.—*Madan Singh*, 21st April, 1865. But one sharer cannot eject another from land, the property of both, which he cultivates.—*Pran Kishwar Ghose*, H. C., 18th February, 1868.

Note (*b*).—*Gholam Kadir Chomdhry*, 21st March, 1866; *Gokul Chunder*, 3rd June, 1868.

The proviso applies only when the application is for ejectment on the determination of a lease.—*Agar Singh*, H. C., 26th April, 1865.

Applications under this Section require a stamp of eight annas only.—*Piyari Mohan Mukharjya*, H. C., 3rd February, 1869.

Page 217, note (*f*).—See *R. Watson*, 18th April, 1867; *C. T. Davis*, 19th June, 1867; *Hara Nath Rai*, 11th September, 1866.

Page 221.—Act VII. 1868, B. C., Section 12 lays down a similar rule in the case of tenures sold for arrears of Government revenue due from them.

Note (*e*).—Add—No appeal lies to the Judge.—*Amra Noshya*, H. C., 6th February, 1869.

Page 228.—When a *zamindary* was sold under Regulation XI., 1822, and the *zamindar* took no steps to cancel an under-tenure, and enhance the rent till about 1862, it was held that his suit must fail, as neither of

the subsequent sale laws contained any saving of rights acquired under statutes which it repealed, and a sale for arrears cannot of itself, and without any proceeding or demonstration of will alter the character of an under-tenure.—*Satya Churn Ghosal*, P. C., 18th January, 1869.

Page 233.—In a recent case it was held when a *putnee* is sold for arrears under a decree, it will only pass free of incumbrances when the right of selling it for an arrear is specially reserved in the lease.—*Bindabun Chunder Chowdhry*, H. C., 7th December, 1867.

Page 245, note (*b*).—The North-Western Court has held that an occupancy *ryot* forfeits his tenure by digging a well, but it is doubtful if that ruling would be followed in Bengal.

Page 247.—If the landlord receive rent from the tenant after decree, ejectment cannot be enforced.—*Nobo Kishen Mukharjya*, H. C., 12th February, 1867. Even if the rent be accepted more than 15 days after decree.—*Raghu Mohini Dasya*, 23rd June, 1868.

Page 251.—A landlord may interpose a tenure between himself and his tenant.—*Mohun Chunder Dutt*, H. C., 31st July, 1866.

Page 260, note (*b*).—In a recent case when the *zamindar* had granted an intermediate lease of a *Mudafat*, and had then refused to accept rent from an under-tenant of a portion of it; the Court held that there was still no relation of landlord and tenant between the intermediate lessee and the under-tenant, because the former had not obtained any assignment of the *zamindar's* right.—*Kalam Rheikh*, 16th Feb., 1869? *Mudafat* (properly *Muzafat plu.* of *Muzaf* "addition") means a tenure which has been resigned or transferred by the original tenant, but is still described by his name in the *zamindar's* books.

Page 261.—This procedure much resembles the procedure of "Surrender and Admittance," by which copy-hold estates are transferred.—1 Stephen's Blackstone, 647.

Page 265, note (*b*).—*Madhub Chunder Pal*, H. C., 23rd July, 1868. But no suit lies to the Civil Court to set aside the Collector's decision.—*Muhammad Nur Baksh*, 7th September, 1866.

Page 264.—Even a transfer by sale in execution of decree is invalid, unless it be registered, and the *zamindar* may eject the purchaser for arrears decreed against the former tenant.—*Bhuva Tarini Dasya*, H. C., 25th August, 1868. Payment by the vendee of a *dur-putneedar*, which vendee had not been recognised by the *putneedar*, counted for nothing.—*Lukshim Naraian Mitter*, 20th June, 1865.

Page 267, note (*f*).—*Uma Churn Sett*, H. C., 2nd July, 1868.

Page 271.—A landlord who has taken possession, under contract, of his lessee's tenure, is entitled to claim the rents due by the *ryots* to that lessee.—*Jogodindra Naraian Deb*, H. C., 31st May, 1865.

Page 277.—A purchaser of a tenure who has been admitted by the Court, cannot refuse rent on the plea, that he has not been able to collect from the *ryots*.—*Indra Bhusan Rai*, H. C, 10th April, 1866.

A suit lies for the recovery of rent which a lessor has covenanted to pay in respect of a period prior to his acquiring the tenure.—*Ashutosh Chuckerbutty*, 20th February, 1866.

When a Police *jaghirdar* died, leaving three years' quit rents unpaid, it was held that the *zamindar* could not sue his son, the succeeding *jaghirdar* for the arrears.—*Nilmani Singh*, 14th August, 1868.

Page 294, note (*a*).—See *Kali Krishen Pal Chowdhry*, 3rd September, 1868.

Page 296.—A sharer can sue, under this Section, without making his co-sharers parties.—*Padma Mani Dasya*, H. C., 3rd March, 1868.

A suit against an agent does not abate on his death.—*R. J. Hills*, June, 1868. An agent cannot question his principal's title.—*Dhananjay Rai*, 10th May, 1865. If the landlord give the agent time to pay up, without the consent of the sureties, responsibility ceases.—*Pogose*, 7th September, 1864. If an agent have collected rents in excess of his authority, suit lies in the Civil Court.—*Kadambari Dasya*, H. C., 3rd June, 1868.

Note (*f*).—Add—*Dhanpat Singh Dugar*, 24th February, 1869.

Page 311.—Persons resisting process should be made over to the Magistrate.—*Chota Sodha*, 6th January, 1868; *Mohan Mundul*, 16th; January, 1868; *Mani Chunder Dass*, 26th January, 1869.

Page 314.—*Gomasta's Sunnuds* require stamp.—*Raghu Nundon Thakur*, H. C., 8th August, 1868, F. B.; Board's Circular 1st February, 1869.

Page 327.—A plaintiff may withdraw his suit.—*Ramchurn Bysack*, H. C., 16th November, 1868.

Page 347.—When a third party intervened on the ground that his title to the lands had been declared by the Civil Court, the point for enquiry was, whether the lands were covered by the decree or not.—*Bir Chunder Jobraj*, H. C., 8th January, 1869. When it appears that a third party

has been in *bonâ fide* receipt of the rent, the Collector may make him a party whether he appears or not.—*Lilla Chal Mundul*, H. C., 29th April, 1868.

When a *ryot* C, holding of A and B, *putneedars*, sold his tenure to D, who also obtained a farm of B's share, and A sued C for the whole rent, it was held that D was entitled, as B's lessee to be made a party to the suit.—*Jumarat Mundul*, H. C., 3rd July, 1868.

If the intervenor's case fail, the plaintiffs must be decreed; the Court cannot decide as between them that neither of them is in possession.—*Phulabati Kumar*, 26th June, 1868.

Page 349.—It has now been decided by a Full Bench, that a third party claiming to be the real tenant by purchase, cannot be made a party to the suit.—*Kalinath Rai*, H. C., 1st September, 1868, F. B.

Page 369.—Execution may be taken out on a *Kisthandi* executed by a judgment-debtor in satisfaction of decree.—*Tarif Biswas*, H. C., 1st February, 1869.

Page 394.—Line 1 for *Jeer* read *Sir* land.

Page 398.—Section 351, C. C. P., was substantially extended to rent suits by Section 160, Act X.—*Mohun Mundul*, H. C., 16th January, 1868.

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5, COUNCIL HOUSE STREET, CALCUTTA.